DOCKET

SUPREME COURT

OF THE UNITED STATES

No. 09-8852	*** CAPITAL CASE ***
Title:	Lawrence Joseph Jefferson, Petitioner v. Stephen Upton, Warden
Docketed:	January 29, 2010
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Nos.:	(07-12502)
Decision Date:	June 12, 2009
Rehearing Denied:	August 28, 2009

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Nov 4 2009	Application (09A438) to extend the time to file a petition for a writ of certiorari from November 26, 2009 to January 25, 2010, submitted to Justice Thomas.
Nov 10 2009	Application (09A438) granted by Justice Thomas extending the time to file until January 25, 2010.
Jan 25 2010	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 1, 2010)
Feb 10 2010	Brief of respondent Stephen Upton, Warden in opposition filed.
Feb 23 2010	Reply of petitioner Lawrence Joseph Jefferson filed. (Distributed)
Feb 25 2010	DISTRIBUTED for Conference of March 19, 2010.
Mar 22 2010	DISTRIBUTED for Conference of March 26, 2010.
Mar 29 2010	DISTRIBUTED for Conference of April 2, 2010.
Apr 12 2010	DISTRIBUTED for Conference of April 16, 2010.
Apr 19 2010	DISTRIBUTED for Conference of April 23, 2010.
Apr 26 2010	DISTRIBUTED for Conference of April 30, 2010.
May 10 2010	DISTRIBUTED for Conference of May 13, 2010.
May 17 2010	DISTRIBUTED for Conference of May 20, 2010.
May 24 2010	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. Judgment VACATED and case REMANDED Justice Scalia filed a dissenting opinion joined by Justice Thomas. Opinion per curiam. (Detached Opinion)
Jun 25 2010	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

IN THE

SUPREME COURT OF THE UNITED STATES

No. 09-8852

LAWRENCE JOSEPH JEFFERSON
Petitioner,

versus,

STEPHEN UPTON, Warden,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

When reviewing trial counsel's decision to abandon investigation when counsel knew that the defendant had suffered a major head injury at the age of two and where retained defense mental health expert recommended further testing in a written report, a majority of the Eleventh Circuit afforded counsel decision a higher-than-strong presumption of reasonableness. *See Jefferson v. Hall*, 570 F.3d 1283, 1301-02 (11th Cir. 2009) ("[a] decision to limit investigation is accorded a strong presumption of reasonableness . . . [and] [t]he standard is even higher where experienced counsel is involved."). This Court, in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 and *Porter v. McCollum*, 130 S.Ct. 447 (2009), has reviewed trial counsel's decisions surrounding the scope of investigation under prevailing professional norms and without applying a presumption of reasonableness, much less a "higher-than-strong presumption of reasonableness."

Thus, the question presented by this case is whether the majority opinion, in affording trial counsel's decision to limit the scope of investigation in a death penalty case "higher-than-strong presumption of reasonableness" conflicts with this Court's precedent as announced in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 and *Porter v. McCollum*, 130 S.Ct. 447 (2009).

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 09-____

LAWRENCE JOSPEH JEFFERSON
Petitioner,

versus,

STEPHEN UPTON, Warden,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Mr. Jefferson respectfully petitions this Court to review the decision of the United States Court of Appeals for the Eleventh Circuit.

JURISDICTION AND LOWER COURT OPINION

The majority and dissenting opinions of the United States Court of Appeals for the Eleventh Circuit are published at 570 F.3d 1283 (11th Cir. 2009), and reprinted at Appendix 1. The Eleventh Circuit opinion issued June 12, 2009. Rehearing was denied on August 28, 2009. *See* Appendix 2. Petitioner received an extension of time to file this Petition until January 25, 2010. *See* Appendix 3. This Court has 28 U.S.C. section 1254 jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense; and

the Fourteenth Amendment to the Constituition:

> nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings

On March 8 and 9, 1986, a jury sitting in Cobb County Georgia, found Petitioner guilty of felony murder and sentced him to death for the killing of Edward Taulbee, a friend and co-worker. The Georgia Supreme Court affirmed the conviction and death sentence, *Jefferson v. State*, 256 Ga. 821, 353 S.E. 2d 468 (1987), and a Motion for Rehearing was denied on March 24, 1987. On October 5, 1987, the Supreme Court of the United States denied the Petition for Writ of Certiorari, with Justices Marshall and Brennan dissenting. *Jefferson v. Georgia*, 484 U.S. 911(1987). The Court subsequently denied rehearing. *Jefferson v. Georgia*, 484 U.S. 872(1987).

Thereafter, Petitioner sought state post conviction relief pursuant to O.C.G.A. §9-14-40, *et seq.* and filed a petition for writ of habeas corpus in the Superior Court of Butts County. The Superior Court conducted an evidentiary hearing wherein a number of

witnesses testified (either live or via affidavit[1]). At the conclusion of the hearing the court allowed briefing on the issues raised. After briefing the court, via *ex parte* communications with Respondent, solicited findings of fact and conclusions of law. Respondent submitted a proposed order which contained glaring errors, including listing a local attorney (Michael Hauptman) as having testified for the Petitioner (he did not) and then finding the witness **who did not testify** to be incredible. The court, rather than correcting this (and other[2]) errors, signed verbatim, Respondent's order denying relief on all grounds.[3] (Appendix **4** at pg. 24).

Petitioner filed a Certificate of Probable Cause to Appeal with the Georgia Supreme Court asserting the state habeas court's actions surrounding the *ex parte* solicitation of a proposed order from Respondent, along with the court's verbatim adoption of the order, denied Petitioner due process and equal protection. In addition, Petitioner asserted the habeas court erred in finding trial counsel rendered effective assistance of counsel. The Georgia Supreme Court granted a Certificate of Probable Cause to Appeal, heard oral argument, and ultimately ruled that although it had "criticized

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[1]*See* O.C.G.A. §9-14-48(a), which allows indigent habeas petitioners to present substantive evidence via affidavit or deposition.

[2] Even the same spelling and punctuation errors are repeated. *Compare* 12/26/91 Response Brief at 41 ("The prosecutors (sic) remakrs (sic) were based....") with Final Order at 35 ("The prosecutors (sic) remakrs (sic) were based....").

[3]Petitioner formally objected and moved to recuse the state habeas court judge. The objection was overruled and the motion denied without a hearing.

courts for their verbatim adoption of findings of fact prepared by prevailing parties. . . the 45-page order in this case [was] well supported by citations to the record and . . . [w]e decline Jefferson's invitation to accord the order less deference than mandated . . . " *Jefferson v. Zant*, 263 Ga. 316, 317 (Ga. 1993). Further, the court found that trial counsel did not perform deficiently in failing to investigate penalty phase mental health issues. *Id.* at 319. The court thus affirmed the judgement of the state habeas court. *Id.* On April 18, 1994, the United States Supreme Court denied Mr. Jefferson's Petition for Writ of Certiorari. *Jefferson v. Zant*, 511 U.S. 1046 (1994). Similarly, on June 13, 1994, the Supreme Court denied Mr. Jefferson's Petition for Rehearing. *Jefferson v. Zant*, 512 U.S. 1215 (1994).

Thereafter, on April 23, 1996, Mr. Jefferson filed a Petition for Writ of Habeas Corpus Under 28 U.S.C. Section 2254.[4] The Petition was amended on January 30, 1998. Petitioner filed a Motion for Discovery which the district court granted in part and denied in part on August 28, 1996. Petitioner's Motion for Evidentiary hearing was similarly granted in part and denied in part on August 31, 1999, and on February 21, 2001, the first portion of an evidentiary hearing was conducted. Thereafter, on May 7, 2002, the district court concluded the hearing. Ultimately, after briefing by the parties, the district court issued an order on May 10, 2007, granting in part and denying in part, the Petition for

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[4]Because the Petition was filed before April 26, 1996, the provisions of the Anti-Terrorism and Effective Death Penalty Act do not apply. *See Lindh v. Murphy*, 521 U.S. 320 (1997).

Writ of Habeas Corpus. *Jefferson v. Terry*, 490 F.Supp. 2d 1261 (N D. Ga. 2007), Appendix 5. The district court found Petitioner was denied effective assistance of counsel during the penalty phase of his trial and ordered the death sentence vacated. The court denied relief on all other grounds.

On May 29, 2007, Respondent filed his notice of appeal and on June 7, 2009, Petitioner filed his notice of cross-appeal. On July 12, 2007, the district court granted Petitioner's Motion for Certificate of Appealability. Essentially there were two issues presented to the circuit court: (1) whether Petitioner was denied effective assistance of counsel at sentencing; and (2) whether Petitioner's right to due process and a reliable sentencing proceeding was violated when a juror consulted a Bible during penalty phase deliberations. After hearing argument on the issues, the Eleventh Circuit reversed the district court's grant of penalty phase relief and affirmed the district court's denial of relief on the juror misconduct claim. *Jefferson v. Hall*, 570 F.3d 1283 (11th Cir. 2009). Judge Carnes filed a dissenting opinion wherein he outlied the reasons he believed the district court was correct in finding Petitioner was denied effective assistance of counsel during at sentencing. *Id.* A timely filed Petition for Rehearing *En Banc* was denied on August 28, 2009. Mr. Jefferson was granted an extension of time to file his Petition for Writ of Certiorari until January 25, 1010. This Petition is timely filed.

B. Facts Relevant to Questions Presented

1. The Trial

a. The Guilt Phase

The facts of the case developed at trial are summarized by the district court as follows:

> Jefferson and the victim, Edward Taulbee, were both employed by the Zenith Construction Company. Taulbee was Jefferson's immediate supervisor. Some time after Taulbee purchased an automobile, Taulbee would take Jefferson home, and Taulbee would sometimes bring Jefferson to work in the morning.
>
> On the day that Taulbee was murdered, May 1, 1985, the employees at Zenith Construction Company got paid [and]. . . both Taulbee and Jefferson were paid on that day. [A supervisor] left the job site at about 4:00 p.m., . . . [and] saw Taulbee and Jefferson working together. . .
>
> Taulbee was killed some time after he left work on May 1, 1985. His body, which was lying in the woods off of Highway 41 in Cobb County, was spotted by two construction inspectors from Cobb County who were passing by in an automobile the next morning . . .
>
> Taulbee's body was found face down in kudzu, and Taulbee was dressed in a yellow shirt, overalls, and boots . . .A large log was laying across Taulbee's head, and the log had blood on it. The police also found near Taulbee's body two sticks or clubs, and one of the sticks appeared to have been shattered in several places. On the stick was some blood and hair. The police observed that Taulbee's head had been driven into the ground, apparently by the log. No wallet was found on Taulbee's body. However, the authorities did find on Taulbee a still-ticking Timex watch, a pocket knife, and a small amount of cash.
>
> Cobb County Police Lt. Carlton Morris . . . and the medical examiner found in Taulbee's belongings a pay stub from Zenith Construction Company. Morris telephoned Zenith Construction Company and ascertained that the pay stub number corresponded to Taulbee. Morris then talked to [the

supervisor] who informed Morris that Jefferson worked with Taulbee. Morris requested that . . . Jefferson come down to police headquarters . . .

During Morris' interview of Jefferson, Jefferson informed Morris that he was originally from Louisville, Kentucky, and that he worked at Zenith with Taulbee. He also told Morris that he had been down in Georgia for about six months and that he had worked with and had known Taulbee about that long. With respect to the day of the murder, Jefferson told Morris that he had seen Taulbee leave the Zenith construction site alone around 5:30 p.m. and head north in his automobile to go fishing. Jefferson stated that he knew Taulbee was going fishing because Taulbee, around 3:00 p.m. that day, had dug up some worms in order to use them for fishing at Lake Allatoona. Jefferson also told Morris that he did not go fishing with Taulbee because "he didn't have the patience to fish." Jefferson stated that when Taulbee left the Zenith construction site, he got on his bicycle and rode home. Jefferson, who lived alone, stated that he watched television, drank beer, and stayed home that afternoon and night.

Jefferson told the police that Taulbee had loaned him $120 and that it was due on Thursday, May 2, 1985. He further stated that he had not paid Taulbee but that he had not gotten his paycheck from Stewart at lunch on payday, the day of the killing. Stewart informed Morris that Taulbee and Jefferson had never had any money problems.

. . . Jefferson consented to a search of his apartment . . . [and] cooperated with the police . . . opening drawers and closet doors while the police searched the apartment. Morris did not find anything connecting Jefferson to the murder of Taulbee. Morris also did not find any signs of struggle on Jefferson.

Rhonda Glade, one of Jefferson's neighbors, testified that she saw Jefferson, Taulbee, and Dwayne Mitchell . . talking outside of Jefferson's apartment at approximately 4:15 p.m. on the day of Taulbee's murder. She testified that she had seen Jefferson and Taulbee leave from Jefferson's apartment to go fishing. Rhonda Glade also testified that later on the night of the killing she saw Jefferson return to his apartment on foot and heard no car arrive.[5] Ms.

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[5]The district court, in a footnote recounted:

Glade further testified that Jefferson came to her apartment on May 2, 1985, and gave her an automated teller bank card (referred to herein as an "ATM card") and asked her to get rid of the card. Jefferson also gave her a fishing tackle box.

Ronald Glade, Rhonda Glade's brother and another neighbor of Jefferson's, testified that on May 1, 1985, he had gone to Jefferson's apartment around 6:00 p.m. He testified that Jefferson had locked the door to his apartment, although Jefferson was inside, which Ronald stated was unusual . . . Jefferson was acting funny and that his chest appeared to be red . . . Jefferson had, prior to the murder of Taulbee, made a statement about hitting his boss on the head and that, after the murder, had informed him that his "little fat buddy was dead." Ronald Glade further testified that on the evening of May 1, 1985, Jefferson stated he had lost his wallet and went out with Dwayne Mitchell to look for it, although Ronald later found the wallet in Jefferson's apartment with approximately $100.00 in cash in the wallet.

Dwayne Mitchell testified that he took Jefferson to buy marijuana and liquor on the night of May 1, 1985. He further testified that Jefferson asked him to drive him to Lake Allatoona the night of the murder to find his wallet, which Jefferson claimed was missing. Mitchell stated that when they arrived at Lake Allatoona, Jefferson left the car for 5 to 10 minutes and returned with a fishing pole and a tackle box . . . Jefferson discarded the fishing pole and gave the tackle box to him . . . on the way back from the lake, Jefferson asked him to take him to a bank with an automated teller machine, where Jefferson disguised himself with a straw hat and sunglasses and attempted unsuccessfully to make a cash withdrawal. Prior to going to the automated teller, Jefferson asked Mitchell if the automated teller

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In her pretrial statement, however, Rhonda Glade said she heard a car arrive and two doors slam when Jefferson returned home that evening. (R. Ex. 21 at 427.) Moreover, in her pretrial statement, she said she was "sure" Ronald Glade and Dwayne Mitchell had not gone to the lake that night because they spent the evening of May 1, 1985, with her. (*Id.* at 434-36.) To the contrary, at trial, Rhonda Glade testified that both Ronald Glade and Dwayne Mitchell had left the apartment during the course of the evening. (*Id.* at 436.)

machine took pictures of those people who used the machines.

On May 7, 1985, Taulbee's car was located in the parking lot of a food store in Cobb County. The parking lot where the car was located was close to Jefferson's residence. The authorities also found the keys to the car inside the automobile. Also found in the glove compartment of the car was a twenty-four hour automatic teller transaction receipt, and the authorities determined that the receipt was dated May 2, 1985, at approximately 1:07 a.m.

The bank card that had earlier been given to Rhonda Glade was subsequently recovered. Taulbee's name was on the card. The authorities also located other fishing items that had belonged to Taulbee and of which Jefferson had apparently attempted to dispose.

The authorities arrested Jefferson on May 7, 1985. A smoking marijuana cigarette was found on the coffee table in Jefferson's living room at the time of his arrest. Jefferson was given the *Miranda* warnings and was taken to the police headquarters where he was again given the *Miranda* warnings before he was interrogated without counsel beginning at 10:45 p.m. When asked why he had killed Taulbee, Jefferson, according to the testimony of Detective B.J. Banks, stated that "he didn't need to be around other people, that he wanted to be executed, and that he wanted to be put to sleep." Lieutenant Morris likewise testified that Jefferson stated the following during the interrogation:

> I don't need to be around people.... I talk to myself. I ain't crazy. I don't know nothing. I got hit by an auto when I was a kid. I had another dream and saw the man in my dream. I call myself Tony. I don't think I am two people. How quick can I be put to sleep? I don' t feel anything about this. Do you believe in Heaven and Hell. .... I want to be put to sleep.... I want to be executed.

The authorities later determined that Taulbee had cashed his paycheck on May 1, 1985, and had received $223.15. It further appeared that Jefferson, who was paid on May 1, 1985, did not cash his paycheck until May 3, 1985. At that time, Jefferson received approximately $136.21. The authorities also determined that in the early morning hours of May 2, 1985, someone

attempted to use Taulbee's ATM card to make a withdrawal.

* * *

The medical examiner . . . testified that the cause of death was the head and brain injuries to Taulbee, and that Taulbee's death was some time on May 1, 1985, between the hours of 5:00 p.m. and 11:00 p.m. . . . [and] it was his opinion that Taulbee was probably knocked to the ground by the blows to the head, and that the log was then dropped on the Taulbee's head, driving his face into the ground.

Jefferson v. Terry, 490 F.Supp.2d at 1271-1275 (foot note substituted, citations omitted).

Based on this evidence, the jury found Mr. Jefferson guilty of felony[6] murder and armed robbery.

b. The Penalty Phase

After the jury returned is guilty verdict, the state pursued two statutory aggravating circumstances: (1) the murder occurred during the commission of another felony - - armed robbery (O.C.G.A. §17-10-30(b)(2); and the murder was outrageously or wanton vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim (O.C.G.A. §17-10-30(b)(7)). The state presented documents from Petitioner's prior convictions and/or arrests, and the witnesses who testified, testified solely about those priors. Trial counsel, offered the testimony of only five witnesses (two jailers, Jefferson's mother and younger sister, and the mother of Jefferson's children), plus Petitioner, consuming only 80 pages of transcript. As the state habeas corpus court

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[6]The jury was specifically instructed on both malice murder and felony murder (T. 1087) and returned a guilty verdict for felony murder. (T. 1154)

found, the extent of the case in mitigation was

> the testimony of Cobb County Deputy Sheriff Bill Wigley that Petitioner had been a good inmate; Deputy Kevin Shrodes that Petitioner was not a problem inmate; Petitioner's mother who testified about Petitioner's car accident and background; Petitioner's sister who testified about Petitioner being in the Navy and later attending vocational/technical school; Linda Dale, the mother of Petitioner's two children who described Petitioner as a good worker and father; and Petitioner himself who testified about his background, his handwritten autobiography which was admitted and denied having made the statement that he had allegedly told police he wanted to be executed.

(Appendix 4 at 19-20) (citations omitted). The jury found the existence of both statutory aggravating circumstances and recommended a death sentence which the trial court imposed.

2. Proceedings in the State Habeas Court

a. The State Habeas Court Abdicated Its Fact-Finding Duty to Respondent

Mr. Jefferson filed a petition for writ of habeas corpus with the Superior Court of Butts County, Georgia, asserting, among other issues, trial counsel were ineffective in failing to conduct a reasonable investigation into mental health related mitigation. At an evidentiary hearing Petitioner called five witnesses, trial counsel Stephen Schuster, and Marc Cella, appellate counsel Ralph Kearns, post-conviction investigator, Julie Brain, and Attorney, Michael Mears. In addition, Petitioner submitted testimony from Dr. James Merikangas, Dr. David Price, Ph.D., James Jefferson, Petitioner's brother, Vera Jefferson, Petitioner's mother, Michael Dale, Petitioner's brother-in-law, Linda Dale,

Petitioner's common law wife, Janice Jefferson, Petitioner's younger sister, Dr. Gary Dudley, Ph.D., the mental health expert utilized by trial counsel and ACLU attorney, George Kendall. Further, Petitioner presented documentary evidence including a report prepared by Dr. Gary Dudley. Respondent called no witness and submitted three exhibits which were the billing records of trial counsel Marc Cella[7] and Stephen Schuster.

After the parties briefed the issues, the state habeas court, rather than acting as a detached and neutral decisionmaker, sought, *ex parte* and without prior notice, proposed findings of fact and conclusions of law from Respondent.[8] The state habeas court signed the proposed order without any change and no doubt without reading it. For example, the proposed order listed Michael Hauptman as a witness called at the evidentiary hearing by Petitioner. But, **Mr, Hauptman was not called as a witness and had absolutely no role in any of the proceedings in Petitioner's case**. Not only was Mr. Hauptman erroneously described as a witness, his non-existent testimony was found to be irrelevant. As mentioned above, the order signed by the state habeas court included the same spelling and punctuation errors found in Respondent's proposed order.

Respondent made credibility findings that credited the testimony of trial counsel (who were being alleged ineffective) over an independent expert witness, Gary Dudley, who had been retained by trial counsel. Ultimately, Respondent's order had the state

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[7]Contained in the billing records of Mr. Cella were the billing records of Dr. Gary Dudley.

[8]The court did not seek a proposed order from Petitioner.

habeas court denying relief on all grounds. In particular, the order found trial counsel did not perform deficiently by failing to further investigate mental health as mitigation. The order did not address prejudice.

The state habeas court, rather than reviewing the proposed order to ensure its accuracy, and rather than making independent judgments, merely signed the proposed order verbatim without noticing the phantom witness or correcting other mistakes. Upon learning of the "ghostwritten" order, Mr. Jefferson sought reconsideration, and filed a Motion to Recuse the state habeas court judge. Both motions were denied.

3. The Georgia Supreme Court Rubber-Stamps Respondent's Fact-Finding

Mr. Jefferson sought a Certificate of Probable Cause to Appeal with the Georgia Supreme Court asking the Court to prohibit the practice of having a party draft the final order in death penalty cases. Further, Mr. Jefferson asked the Georgia Supreme Court to vacate the order drafted by Respondent. Lastly, Mr. Jefferson asked that the court find he received ineffective assistance of counsel at the penalty phase of his trial.

While criticizing the state habeas court "for [its] verbatim adoption of findings of fact prepared by prevailing parties" and recognizing the order referred to a phantom witness who never testified, the court nevertheless rubber-stamped the habeas court's order because the "order in this case is well supported by citations to the record." *Jefferson v. Zant*, 263 Ga. 316, 317 (1993).

As to the merits of Petitioner's claim trial counsel rendered ineffective assistance

of counsel by failing to conduct an adequate investigation into mental health mitigation, the Georgia Supreme Court found trial counsel did not act deficiently because:

> Jefferson's attorneys prepared extensively for a possible sentencing phase, including travelling[9] [sic] to Jefferson's home in Kentucky to interview family members and obtaining a psychological evaluation by a psychologist recommended to them by the American Civil Liberties Union. The psychologist reported that Jefferson was of average intelligence, and, although he was impulsive, immature, had poor impulse control and would "pursue immediate gratification without properly considering possible consequences," he was not psychotic or seriously mentally ill.
>
> The report did suggest that a neuropsychological evaluation might be "worthwhile ... to rule out an organic etiology." However, in subsequent telephone conversations with Jefferson's attorneys, the psychologist indicated that further examination would not likely be beneficial because Jefferson did not have serious mental problems and was of normal intelligence. Counsel explained that in light of this advice, as well as their own observations of Jefferson and Jefferson's adamant assertion that he had not committed the crime, they concluded that there was no reason to explore further any mental issue, or to call the psychologist to testify in mitigation.[10]

Jefferson v. Zant, 263 Ga. at 319. Thus, the court concluded that "although other attorneys might have explored the mental issue further, we cannot conclude that the investigation and tactical judgement of Jefferson's attorneys was outside the wide range of reasonably effective assistance." *Id.* The state court, finding no deficient performance, never reached the issue of prejudice. *Id.*

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[9]The billing records submitted by Respondent in state post-conviction proceedings reveal that trial counsel traveled to Louisville on February 20, 1986, four (4) days prior to the beginning of trial. Further, the trip, from beginning to end (including the drive to and from Louisville) lasted from 5:00 a.m. to 11:00 p.m., 18 hours.

[10]The Georgia Supreme Court's fact finding was essentially the same as the fact-finding of the Butts County Superior Court.

4. Post-Conviction Proceedings in the District Court

Mr. Jefferson, pursuant to 28 U.S.C. §2254, filed a Petition for Writ of Habeas Corpus in the district court. The district court granted discovery on a claim that the prosecutor's decision to seek death was impermissibly based on race. In addition, the deposition[11] of a sitting juror, Richard Berry, was taken wherein he revealed "towards the end of our sentencing when we were deciding what the sentence should be" and when the foreman of the jury was going around the table allowing each of the jurors to "have their say about the subject", an elderly juror "just opened the Bible up and read a passage." Although he could not recall the specific Biblical passage that the juror read, and he could not recall her making any statement about the passage, it clearly appeared to him that what she had read "justified what she was doing at the time." The juror who read the passage was identified as Marjorie West but could not be called to testify due to her age at the time and the fact that she was mentally infirm and incompetent.

Noting that Petitioner's case was initiated prior to April 26, 1996, the district court correctly held that the deferential provisions of the AEDPA did not apply to Petitioner's claims. *Jefferson v. Terry*, 490 F.Supp. 2d at 1280-81. Reviewing questions of law *de novo* and affording deference to state court findings of fact, the district court found trial court performed deficiently in two areas.

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[11]The deposition of Mr. Berry was made part of the district court record and forms the basis for Petitioner's jury misconduct claim.

First, that trial counsel failed to object to the prosecutor's questioning which implicated Mr. Jefferson's invocation of his right to remain silent - - *i.e.*, a violation of the rule announced in *Doyle v. Ohio*, 426 U.S. 610 (1976). Specifically, the court found that the testimony of law enforcement about Petitioner's "refusal to talk about the crime or the ATM card and tackle box . . . impermissibly commented on Jefferson's silence. . ." and [counsel's] failure to object constituted deficient performance." *Jefferson v. Terry*, 490 F.Supp. 2d at 1313-14. The court, however, found Petitioner had still not established an ineffective assistance of counsel claim "because he has failed to demonstrate . . . there is a reasonable probability that the results of the proceedings would have been different." *Id.* at 1314.

Second, the district court found that trial court performed deficiently in their failure to investigate fully mental health as mitigation. The court noted, "an attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." *Id.* at 1318 (*citing Grayson v. Thompson*, 257 F.3d 1194, 1225 (11th Cir. 2001)). The court adopted the findings of fact from the state courts and determined that

> Attorney Cella contacted Dr. Gary E. Dudley to conduct the examination of Petitioner. Following the examination, Dr. Dudley related to Attorney Cella that Petitioner was in the midrange level of intelligence and that any mental deficiencies were "quite mild and in no way impaired his judgment or his decision-making capacity." Dr. Dudley also indicated to counsel that he found Petitioner both competent to stand trial and sane at the time of the offenses.

Id. at 1320. However, Dr. Dudley also prepared a report dated November 10, 1986, which indicated those findings but also noted:

> One possibility that could not be explored because of his incarceration has to do with the sequelae to head injury experienced during childhood. In my opinion, it would be worthwhile to conduct neuropsychological evaluation of this individual to rule out an organic etiology.

See, Jefferson v. Hall, 570 F.3d at 1294.

The district court noted that Mr. "Schuster then conferred with Dr. Dudley about his written report and, in particular, Dr. Dudley's suggestion that a neuropsychological evaluation be conducted to rule out an organic etiology." *Jefferson v. Terry*, 490 F.Supp. 2d at 1319. The district court found that:

> In this subsequent conversation[12], Dr. Dudley led Mr. Schuster to believe

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[12]Judge Carnes, in his dissent, noted that although the federal courts were "obliged" to accept as true the testimony of Mr. Schuster (because the state habeas court expressly credited it), "there are reasons to doubt it." *Jefferson v. Hall*, 570 F.3d at 1312. One of the reasons to doubt Schuster's testimony is that his detailed billing records, submitted by Respondent into evidence in state post-conviction proceedings, do not reflect any conversations with Dr. Dudley *after* Dr. Dudley's report was written.

When examining the billing records of Mr. Schuster and Mr. Cella, the following is revealed. Mr. Cella telephonically contacted Dr. Dudley on November 25, 1985 and spoke with him for approximately12 minutes. The following day, Mr. Cella had a "conference" with Dr. Dudley which lasted 45 minutes. Mr. Cella's billing records reflect no further contact with Dr. Dudley. Mr. Schuster's billing records reflect that he had one contact with Dr. Dudley, a "conversation . . . re: Client's mental health" which occurred on December 10, 1985 and lasted for 12 minutes. Dr. Dudley's report, however, was dated February 10, 1986, *after* Schuster's last contact with Dr. Dudley. Further, Dr. Dudley's billing records indicate his last visit with Mr. Jefferson was on December 13, 1985. Thus, by the documentary evidence submitted by both parties, it appears that Schuster did not have a conversation with Dr. Dudley *after* the he received Dr. Dudley's

> that further investigation would simply be a waste of time because Petitioner was not psychotic, was intelligent and had a fairly high I.Q. Based upon Dr. Dudley's written report and the follow-up conversation, counsel saw no need to have further neuropsychological testing done,

Id. Further, based upon Dr. Dudley's informal description of Petitioner as "just a criminal" counsel concluded Dr. Dudley had no helpful testimony, and chose not to call Dr. Dudley in mitigation.[13] *Id.* The court noted that even though counsel knew Petitioner had suffered a head injury in the past, Dr. Dudley's statements led counsel "to believe that further neuropsychological testing would be a waste of time." *Id.* at 1320.

Contrary to the state court however, the district court found trial counsel's decision not to call Dr. Dudley was not reasonable. The court noted the question before it was "not whether counsel should have presented additional mitigating evidence . . . [but] is

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report recommending neuropsychological testing. Nevertheless, in signing Respondent's proposed order, without even reading it, the state habeas corpus court credited Mr. Schuster's testimony over that of Dr. Dudley despite the fact that Mr. Schuster's own billing records contradicted his testimony.

[13]Another "reason to doubt" the fact findings of the state court (*see* n. 13, *supra*) is the fact that Respondent wrote the order wherein the state habeas court purportedly credited the testimony of Schuster over Dr. Dudley who:

> adamantly den[ied] that he had ever said anything of the sort to Schuster or to anyone else. Dr. Dudley insisted that it had always been his expert opinion "that neuropsychological testing was necessary" and that he "meant it." He swore: "I never, before or after that report, suggested to [Jefferson's attorneys] that such an evaluation was not necessary or that it would not be worthwhile."

Jefferson V. Hall, 570 F.3d at 1312 (Carnes, J. dissenting). This is especially true when the state habeas court signed verbatim the order prepared by Respondent which listed a witness for Petitioner **who did not testify** and then rejected the relevance of that phantom witness.

whether the investigation supporting counsel's decision not to investigate further for mitigating evidence was reasonable." *Id.* at 1321 (*citing Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003)) The court concluded that "had Petitioner's trial counsel not abandoned their investigation of Petitioner's mental health prematurely, they should have and likely would have become aware of Petitioner's brain damage." *Jefferson v. Terry* 490 F.Supp. 2d at 1321. Further, the court found trial counsel's investigation lacking in that they failed to present any background information to Dr. Dudley *id.* at 1324 ("Dr. Dudley, who had no background information furnished to him by trial counsel . . .") and failed to contact the family until just before trial and *after* Dr. Dudley's report had been completed and the decision not to use mental health was already made. *Id.* at 1322-23 ("had trial counsel . . . developed questions concerning the injury as a part of their background investigation of Jefferson, and **contacted the family members and friends of Jefferson earlier in the case**, counsel likely would have learned critical information about the head injury and the medical problems that Jefferson had as a child. (emphasis added)).

While the district court found that trial counsel did, in fact, choose not to further investigate mental health, the court found that this choice was not reasonable because it was "not supported by reasonable professional judgment." *Id.* at 1325. Instead, the court found:

> no competent lawyer would have abandoned an investigation into potential mitigating evidence based on the oral opinion of a mental health expert that the defendant was "just a criminal," particularly when that mental health expert previously had provided a written expert report explicitly stating that

> it would be worthwhile to conduct further testing to determine whether the defendant suffered from "organic etiology" or brain damage. While "reasonably diligent counsel may draw a line [in their investigation] when they have good reason to think further investigation would be a waste," *Rompilla v. Beard*, 545 U.S. 374, 383, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), trial counsel did not have a good reason here.

Id.

Having found counsel performed deficiently, the district court went on to determine whether Petitioner was prejudiced. In concluding in the affirmative, the court found:

> In regard to what counsel would have discovered with further reasonable investigation, including specifically a neuropsychological evaluation . . . Petitioner suffers from permanent brain damage of the acquired, post-traumatic type, which is most pronounced in the right hemisphere of the brain, including the frontal lobe . . frontal lobe syndrome or brain damage . . .causes abnormal behavior . . . over which he has no or substantially limited control . . .

Id. at 1321. The court went on to find "[b]ecause of counsel's omissions in this case, the jury was deprived of the singularly most powerful explanation for the crime-Petitioner suffered from organic brain damage that impaired his judgment and his ability to control his behavior." *Id.* at 1327. Ultimately, the court found:

> Petitioner has presented a compelling and unrebutted case that he suffers (and suffered) from organic brain damage, a dysfunction that affected his cognitive ability and his ability to conform his actions. This compelling evidence could and should have been presented to the sentencing jury. Had such evidence been presented, there is a reasonable probability that the jury would have returned a sentence of life in prison rather than a death sentence. Because trial counsel unreasonably failed to investigate and present this compelling mitigating evidence, this Court's confidence in the outcome actually reached at sentencing is significantly undermined.

> Petitioner has therefore established the prejudice resulting from trial counsel's ineffectiveness, and Petitioner is entitled to a new a sentencing hearing at which this mental health evidence can be presented.

Id. at 1328.

5. The Eleventh Circuit Majority Opinion

Respondent appealed the district court's granting of penalty phase relief and Petitioner cross-appealed the denial of relief on the juror misconduct claim. A divided panel of the Eleventh Circuit reversed the grant of habeas relief based on ineffective assistance of counsel and affirmed the denial of relief based on juror misconduct. Judge Carnes filed a dissenting opinion wherein he found trial counsel were ineffective.

Judge Marcus, joined by Judge Tjoflat, found that the district court erred in determining trial counsel performed deficiently in prematurely abandoning their mental health as mitigation investigation. The majority acknowledged that trial counsel ceased its mental health investigation after receiving Dr. Dudley's report and consulting with him thereafter. The majority went on to state that

> Since Jefferson's claim stems from his lawyers' decision to limit the scope of their investigation into potentially mitigating mental health evidence, we view the deference owed these strategic judgments

Jefferson v Hall, 570 F.3d at 1301. The majority went on to note that [i]n reviewing a lawyer's professional judgements, a decision to limit investigation is accorded a strong presumption of reasonableness." *Id.* (*Citing Mills v. Singletary*, 63 F.3d 999, 1021 (11th Cir. 1995), *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987), and *Strickland v.*

Washington, 466 U.S. 668 (1984)), and that when trial counsel is experienced the presumption is even higher. *Id.*

With this presumption in mind, the majority found "the decision of Jefferson's trial counsel not to conduct neuropsychological testing or to present mental health at the penalty phase of the trial was not constitutionally ineffective." *Id.* at 1302. The majority then listed all of the things trial counsel did in preparation for trial, the majority of which centered on the guilt phase of the trial: filing 30 motions; visiting the crime scene; visiting Petitioner's apartment and place of employment; interviewing state witnesses; traveling to Kentucky to visit with Petitioner's family.[14] *Id.* at1302-03.. The majority also noted that although Petitioner protested his innocence and they saw no evidence of mental illness, trial counsel "took the added precaution of requesting a psychological evaluation of Jefferson" and upon consulting with a lawyer from the ACLU, hired Dr. Gary Dudley. *Id.*

The court went on to note that Dr. Dudley met with Petitioner four times after which he provided a written report to trial counsel.

The report concluded that Jefferson was in the middle range of intelligence,

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[14]The billing records of trial counsel indicate that this trip to Kentucky occurred 4 days prior to the start of trial and the entire trip, including driving to and from Louisville, took approximately 18 hours. A Mapquest inquiry reveals that the estimated time of travel one way from Marietta, Georgia to Louisville, Kentucky would take six hours and twenty three minutes. Assuming the accuracy of this estimate, counsel therefore spent a total of less than five and one half (5 ½) hours to meet Petitioner's family, visit the courthouse and interview government penalty phase witnesses.

> that the magnitude of his deficiencies was quite mild, and in no way impaired his judgment or decision-making capacity, and that he was not psychotic. The report also mentioned "sequelae to head injury experienced during childhood" as a "possibility" that Dr. Dudley was unable to explore, and said that "it would be worthwhile to conduct neuropsychological evaluation of [Jefferson] to rule out an organic etiology."

Id. at 1303. Like the state courts, the majority noted that attorney Schuster had a conversation with Dr. Dudley after being provided the report wherein Dr. Dudley indicated further neuropsychological testing would likely be a waste of time and that Petitioner was "just a criminal." *Id.* at 1304. Based on this conversation, and their observations that Petitioner did not overtly exhibit symptoms of mental illness, trial counsel elected not to further investigate mental health. *Id.*

The majority also found there were other reasons justifying trial counsel's decision not to further investigate mental health. First, the majority found important the fact that "Jefferson had unwaveringly proclaimed his innocence, and that the State's case against him suffered from many weaknesses." *Id.* at 1305. Second, the majority found that pursuing an innocence defense at trial "would not have meshed easily with the presentation of a mental illness defense at the penalty phase." *Id.* Thus, reasoned the majority, the decision to pursue a "residual doubt" penalty phase defense, among other things, was not unreasonable. *Id.* at 1306.

Lastly, the majority found unpersuasive the argument that there was no down side to seeking further neuropsychological testing because "attorneys in these cases have finite resources to expend, seeking funds for and gathering additional mental health evidence

may have hampered the ability of Jefferson's counsel to work on establishing his innocence." *Id.* The majority went on to reverse the district court's grant of habeas relief finding "the performance of Jefferson's counsel at the penalty phase of his trial was reasonable." *Id.* Having found no deficient performance, the majority never addressed the prejudice prong of *Strickland.*

6. Judge Carnes' Dissent

Judge Carnes authored a strenuous dissent noting:

> The twelve men and women who decided whether Lawrence Jefferson should live or die heard only a brief reference to the fact that when he was two years old a car ran over the top of his head, he was taken to the hospital, and "he just barely made it." The jury heard nothing else about the extent of his injuries and nothing about the devastating effect those injuries had on his life. The jury was not told that he was hospitalized for weeks. That the trauma he suffered permanently misshaped his head, leaving him with a cranial indentation and an abnormally enlarged skull caused by the pressure of cerebrospinal fluid. That it resulted in frontal lobe and neurological damage, which had a profound and lifelong impact on his behavior. That it caused learning disabilities, emotional instability, diminished impulse control, and intermittent outbursts of rage. That it led to impaired judgment and paranoia. That the neurological damage resulting from the head injury deprived him of a normal ability to premeditate, deliberate, distinguish right from wrong, and act rationally. That he had substantially limited or no control over the abnormal behavior caused by the brain damage he suffered.
>
> The jury was told nothing about the impact of Jefferson's childhood injury on his life and his behavior. As far as the jury knew, Jefferson did not suffer from brain damage or neurological impairment; he had no organic disorders or pathologies; his emotional stability, impulse control, and judgment were perfectly normal; he could premeditate, deliberate, distinguish right from wrong, and act rationally as easily as the next person. The jury had that misleading picture of Jefferson's moral culpability because the most important mitigating circumstances were withheld from it.

> The reason the jury did not know the critical facts about Jefferson's organic brain damage and its devastating effects on him is that his trial counsel failed to request a neuropsychological examination. They failed to request one even though they knew from what Jefferson told them, from the statements he made to the detectives, and from what his mother said that Jefferson had suffered a serious head injury as a child when he was run over by a car. They failed to request an examination even though they were advised to do so by Dr. Gary Dudley, the psychologist who had seen Jefferson.

Jefferson v. Hall, 570 F.3d at 1311.

Although "[n]europsychological testing was "available and routine at the time of Mr. Jefferson's trial," and "it is undisputed that the testing ... could have easily been performed by available mental-health professionals in the Atlanta area prior to [Jefferson's] sentencing," trial counsel's "main excuse for not asking is Dr. Dudley discouraged [trial counsel] from seeking a neuropsychological examination . . .basically sa[ying] it may be a waste of time. . .and that Jefferson was "just a criminal." *Id.* at 1312. Judge Carnes noted that Dr. Dudley submitted an affidavit adamantly denying he discouraged further testing and/or that he said Petitioner was "just a criminal" but, even though there was reason to doubt[15] the state court's crediting trial counsel's testimony over that of Dr. Dudley, he noted he was bound to give deference to the state court's findings. *Id.* Nevertheless, Judge Carnes noted that even taking everything Schuster said as true, trial counsel's "representation still falls outside of the wide range of reasonably effective assistance." *Id.*

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[15]*See* footnotes 13, 14 & 17.

The dissent noted trial counsel knew Petitioner had his head run over by a car because they had a transcript of a statement wherein Petitioner mentioned the accident, Petitioner's mother had also told them about it, and Dr. Dudley referenced it in his report. *Id.* Indeed, an indentation in Petitioner's skull resulting from the accident was clearly apparent. *Id.* Rather than affording a presumption of reasonableness to trial counsel's decision to abandon mental health investigation, the dissent, following this Court's precedent in *Williams v. Taylor, supra, Wiggins v. Smith, supra,* and *Rompilla v. Beard, supra,* found:

> Schuster has never explained why he thought Dr. Dudley, after issuing a formal report recommending an important examination to check for organic brain injury, would pivot 180 degrees and take back that recommendation when he spoke informally with Schuster over the phone. The facts Dr. Dudley allegedly mentioned to Schuster during their telephone conversation are all facts he knew at the time he submitted his written report recommending the examination. Indeed, they are all set out in the same report that contains the recommendation. Yet, from all that appears in the record, Schuster never even asked Dr. Dudley why he would write one thing in the report and say exactly the opposite thing over the telephone. *See* Dist. Ct. Order at 85 ("There is no indication, however, that [Jefferson's] trial counsel ever sought a clear-cut explanation from Dr. Dudley as to how or why he went from stating his opinion in a written report that it would be worthwhile to conduct a neuropsychological evaluation to stating orally that such an evaluation would likely be a waste of time and that [Jefferson] was 'just a criminal.'").
>
> Knowing that his client had suffered a serious head injury as a child and that a psychologist had issued a formal report recommending further testing to determine if the injury had caused organic brain damage, no reasonable attorney would have let the matter drop because of informal remarks made to him during a telephone conversation. Not without a convincing explanation for the change of mind, and there was none. Absent any explanation for the about-face, any reasonable attorney would have filed a

> motion for a neuropsychological examination, citing the head injury and the recommendation in the report. Schuster's failure to do so was deficient performance. *See* Dist. Ct. Order at 85 ("[N]o competent lawyer would have abandoned an investigation into potential mitigating evidence based on the oral opinion of a mental health expert that the defendant was 'just a criminal,' particularly when that mental health expert previously had provided a written expert report explicitly stating that it would be worthwhile to conduct further testing to determine whether the defendant suffered from 'organic etiology' or brain damage.").

Jefferson v. Hall, 570 F.3d at 1313.

Judge Carnes also took issue with the majority's conclusion that trial counsel rendered effective assistance based on their preparation for trial. First, the fact that trial counsel filed thirty motions did not carry the day as:

> [v]irtually all of those motions relate solely to the guilt stage, and all of them are beside the present point. Adequate, or even stellar, performance in regard to one aspect of the trial does not bar a conclusion that counsel performed ineffectively in another regard. The cases are legion in which an attorney's performance has been found to be effective at the guilt stage and ineffective at the sentence stage.

Id. at 1314.

Further, the majority's reasoning that trial counsel was justified in not seeking neuropsychological testing because they chose instead "to follow a residual doubt strategy" was unpersuasive for at least three reasons. First, that decision was not reasonable because it was based on an investigation that was incomplete. *Id.* The dissent, applying this Court's precedents in *Strickland v. Washington*, 466 U.S. at 690-91, and *Wiggins v. Smith*, 539 U.S. at 527-28 (finding ineffective assistance because "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed

decision with respect to sentencing strategy impossible"), found

> defense counsel's investigation into the effects of the serious head injury Jefferson suffered as a child was not just "less than complete," it was virtually non-existent. Reasonable professional judgment did not support their failure to file a motion requesting a neuropsychological examination. The decision that followed from that failure was not based on strategy but on ignorance, not only about whether Jefferson was brain-damaged but also about how it might affect his behavior . . . Making decisions based on ignorance is not professionally reasonable.

Id. at 1315 (footnote omitted).

Second, the dissent reasoned that results from further neuropsychological testing would not have been inconsistent with the theory of defense that had been presented by trial counsel. Judge Carnes noted that trial counsel put up witnesses who spoke of the difficult life Petitioner had growing up, that he served in the Navy, he was a hard worker, good father, good son, and brother. *Id.* Moreover, trial counsel elicited from Petitioner's mother, albeit "almost in passing," that Petitioner had his head run over by a car when he was two years old. Thus, Judged Carnes correctly reasoned, "[i]f the existence of that kind of head injury is not inconsistent with a residual doubt strategy, the fact that it had resulted in permanent and profound organic brain damage is not either." *Id.*

Last, the dissent persuasively pointed out:

> There is a third reason that pursuit of a residual doubt strategy does not excuse trial counsel's failure to investigate Jefferson's brain damage and its effect on his life and behavior. Trial counsel did not actually pursue a residual doubt strategy, at least not one worthy of the name. The state collateral court never found that a residual doubt strategy was actually used. The majority says one was, but the record tells another story.

Id. at 1316. None of the witnesses who testified said anything about residual doubt. But even more important, the defense called Petitioner to testify and in his testimony he never even hinted he did not commit the crime. The dissent noted, trial counsel never even asked Petitioner if he had committed the crime and their failure to do so "is inconsistent with the majority's theory that a residual doubt strategy trumped the need to investigate mitigating circumstances based on the serious head injury Jefferson had suffered." *Id.*

Perhaps the best evidence residual doubt was not pursued was, as the dissent pointed out, trial counsel, in closing, actually admitted guilt. Mr. Cella argued to the jury that Petitioner's "background, his life experience, has caused him to strike out at a defenseless person, such as Ed Taulbee, that he killed without necessity, and ya'll found that." *Id.* at 1318. Further, trial counsel repeatedly emphasized Petitioner's hard life growing up "in the ghetto and mostly without a father." *Id.* at 1316. Counsel urged the jury to consider that the people Petitioner had grown up with and associated with were a bad influence on him. They asked the jury to look at his good qualities, to look into their own hearts "to find some understanding, some love, some compassion" for Petitioner. The dissent noted that instead of residual doubt, trial counsel's closing stressed, "mercy-despite-guilt." *Id.* at 1317. All-in-all,

> in a combined twenty-seven transcribed pages of argument Jefferson's attorneys made only two passing references to possible weaknesses in the state's case. One counsel acknowledged that the issue of guilt was closed while the other conceded that Jefferson had committed the murder, stating that his "background, his life experience, has caused him to strike out at a defenseless person, such as Ed Taulbee, that he killed without necessity."

> A residual doubt strategy that concedes the defendant murdered the defenseless victim is not a strategy at all.

Id. at 1318-19.

The dissent ultimately determined trial counsel performed deficiently in not seeking the neuropsychological testing recommended by Dr. Dudley:

> Given that Jefferson's head was run over by a car when he was a child, it was unreasonable to abandon an investigation into organic brain damage as a source of mitigating circumstances in favor of a throw-away residual doubt argument-especially one that actually was thrown away in closing argument. Showing that Jefferson suffered from organic brain damage which had a profound and lifelong impact on his behavior, causing him all kinds of emotional and behavioral problems and leaving him with impaired judgment and diminished impulse control, would have fit perfectly into counsel's mercy-despite-guilt arguments. The best evidence to support a mercy argument is that, through no fault of his own, Jefferson had a damaged brain that deprived him of a normal ability to premeditate, deliberate, and distinguish right from wrong and that caused him to behave abnormally. But trial counsel's unreasonable failure to file a motion requesting a neuropsychological examination deprived Jefferson of all that mitigating evidence.

Id. at 1319.

Noting that "Georgia law mandates a life sentence unless the jury unanimously agrees on death. *Hill v. State,* 250 Ga. 821, 301 S.E.2d 269, 270 (1983); *Miller v. State,* 237 Ga. 557, 229 S.E.2d 376, 377 (1976)" the dissent correctly reasoned that "the measure of prejudice is whether "there is a reasonable probability that at least one juror would have struck a different balance" of aggravating circumstances and mitigating circumstances. *Wiggins,* 539 U.S. at 537, 123 S.Ct. at 2543." *Jefferson v Hall*, 570 F.3d at 1320. Based on the evidence developed in post-conviction proceedings, the dissent

found:

> there is that reasonable probability and more. The results the examination would have produced . . . are not disputed. *See* Dist. Ct. Order at 91 (noting that Jefferson "has presented a compelling and unrebutted case that he suffers (and suffered) from organic brain damage, a dysfunction that affected his cognitive ability and his ability to conform his actions"); *id.* at 87 (referring to the "powerful mitigating evidence regarding [Jefferson's] brain damage"). On this record depriving the jury of all that strong mitigating circumstance evidence does not just undermine confidence in the death sentence but substantially undermines it.

As the dissent emphasized, "the prejudice question is not even close to being close. *Id.*

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit Panel Majority's Application of a Heightened Presumption of Reasonableness to Trial Counsel's Decision to Abort Mental Health Investigation Conflicts With This Court's Holdings in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005) and *Porter v. McCollum*, 130 S.Ct. 447 (2009)

Two of the four federal judges who have examined this case *de novo* (as is required in pre-AEDPA cases) have determined Petitioner received ineffective assistance of counsel at the penalty phase of his capital trial. This Court must break that tie.

A. The Erroneous Standard Applied by the Eleventh Circuit Majority

The Eleventh Circuit majority in assessing whether trial counsel's performance was deficient determined that when it reviewed "[a] decision to limit investigation" it would "accorded a strong presumption of reasonableness" to that decision. *Jefferson v. Hall*, 570 F.3d at 1301. Further, the majority indicated it would apply an even greater

presumption in this case. *Id.* ("The standard is even higher where experienced counsel[16] is involved." *citing Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000)). This "higher-than-strong presumption of reasonableness" is in direct contravention of this Court's decisions in *Williams v. Taylor, supra, Wiggins v. Smith, supra, Rompilla v. Beard, supra* and *Porter v. McCollum, supra*, none of which afforded such a presumption but reviewed trial counsel's decisions on investigation through the prism of "prevailing professional norms."

B. Analysis Under the *Correct* Legal Framework

Without the distorting effect of the majority's "higher-than strong presumption of reasonableness," it is clear that the district court and Judge Carnes' were correct in finding trial counsel rendered ineffective assistance of counsel. In order to establish a violation of the right to effective assistance of counsel a habeas petitioner must satisfy a two pronged test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). A showing of deficient performance

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[16]The majority subsequently described trial counsel as "seasoned criminal defense lawyers." *Jefferson v. Hall* 570 F.3d at 1302.

requires a showing that "counsel's representation fell below an objective standard of reasonableness" and a showing of prejudice requires demonstrating that "but for counsel's unprofessional errors, there is a reasonable probability the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome" *Id.* at 687-88.

In assessing the performance prong, this Court has noted, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690. However, "choices made after less than complete investigation" are not afforded such a presumption of reasonableness. Instead, those decisions made after less than complete investigation are to be scrutinized to determine if "reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id* at 691.

It is now "unquestioned that under the prevailing professional norms at the time of [Petitioner's] trial, counsel had an obligation to conduct a thorough investigation of the defendant's background." *Porter v. McCollum*, 130 S.Ct. 447, 452 (2009) (*quoting Williams v. Taylor*, 529 U.S. 362, 396 (2000)). Although "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing," counsel has a duty to conduct a "requisite diligent investigation into his client's . . . background." *Williams v.*

Taylor, 529 U.S. at 415, (O'Connor, J., concurring). Hence, a decision not to investigate . . . must be directly assessed for reasonableness in all the circumstances. *Wiggins v. Smith*, 539 U.S. 510, 533 (2003).

Here, there is no question trial counsel was on notice that Petitioner had suffered a head injury when, at two years old, his head was run over by a car. Petitioner said as much in a tape recorded custodial statement provided to trial counsel by the state and his mother informed them of the accident (and subsequently testified to it at trial). Indeed, it is clearly apparent on Petitioner's skull. Further, it is undisputed that trial counsel was aware that Dr. Dudley had suggested further investigation - - neuropsychological testing - - because he suspected Petitioner suffered from organic brain damage. Thus, as the district court noted, the question to be answered was "whether the investigation supporting counsel's decision not to investigate further was reasonable." *Jefferson v. Terry*, 490 F.Supp. 2d at 1321 (*citing Wiggins v. Smith*, 539 U.S. at 522-23).

In the instant case trial counsel "attempt[ed] to justify their limited investigation as reflecting a tactical judgment . . . to pursue an alternative strategy." *Wiggins v. Smith*, 539 U.S. at 521. Specifically, trial counsel claimed to have abandoned mental health investigation because Dr. Dudley "basically said it may be a waste of time because the rest of the report ... said that [Jefferson] was non psychotic, that he was intelligent, he had

a fairly high IQ..." *Jefferson v. Hall*, 570 F.3d at 1312.[17] As the district court noted:

> [w]hile "reasonably diligent counsel may draw a line [in their investigation] when they have good reason to think further investigation would be a waste," *Rompilla v. Beard*, 545 U.S. 374, 383, 125 S.Ct. 2456, 162 L.Ed 2d 360 (2005), trial counsel did not have a good reason here. Therefore, even if Petitioner's attorneys made a strategic choice not to spend additional time investigating Petitioner's mental health, the limit that counsel placed on the investigation was not supported by reasonable professional judgment. *See Wiggins*, 539 U.S. at 533, 123 S.Ct. 2527

Jefferson v. Terry, 490 F.Supp 2d at 1325. *See also*, *Jefferson v. Hall*, 570 F.3d at 1313 (Carnes, J., dissenting) ("Taking everything that Schuster says as true, his representation still falls outside of the wide range of reasonably effective assistance.").

There was no need to draw a line in the investigation here. "All that it would have taken is a simple, short motion informing the court of Jefferson's serious childhood head injury and attaching a copy of Dr. Dudley's report," *Jefferson v. Hall*, 570 F.3d at 1315, n. 3., and trial counsel would have had the funds for neuropsychological testing. Because trial counsel did not seek the funds, they did not obtain the testing that would have revealed Petitioner suffered from a serious mental disorder - - organic brain damage. Thus, counsel's decision to forego testing was not "strategic [] since trial counsel was not aware of the mental health evidence that might have been available." *Jefferson v. Terry*, 490 F.Supp. 2d at 1324. A decision "based on ignorance is not professionally

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[17]The district court found that trial counsel "unreasonably limited their mental-health inquiry to what they perceived as the three standard mental-health defenses (i.e. competency at the time of the crime, at the time of trial or mental retardation.)." *Jefferson v. Terry*, 490 F.Supp. 2d at 1325.

reasonable." *Jefferson v. v. Hall*, 570 F.3d at 1315 (Carnes, J., dissenting) (*citing Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995)). As a result of this ignorance,"defense counsel's investigation into the effects of the serious head injury Jefferson suffered as a child was not just less than complete, it was virtually non-existent." *id.* at 1315.

Rather than apply the clear precedent of this Court, Particularly *Wiggins v. Smith, supra*, the panel majority applied a "higher-than-strong presumption of reasonableness" to trial counsel's decision to abandon mental health investigation. Had the panel majority accurately applied the law of this Court, it would have found, as Judge Carnes did, in *Wiggins*:

> defense counsel testified that they had made a reasonable strategic decision to focus the jury's attention on the defendant's role in the crime instead of presenting the defendant's difficult life and history as mitigating circumstances. The Supreme Court rejected that justification for counsel's failure to perform a more thorough investigation. It did so because "[t]he record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct" by showing that the failure to investigate was not the result of reasoned strategic judgment. What the record showed in *Wiggins* was that "[f]ar from focusing exclusively on petitioner's direct responsibility. . . counsel put on a halfhearted mitigation case." Likewise, the record in this case shows that far from focusing exclusively on a residual doubt strategy, counsel put on a halfhearted mitigation case. Here, as in *Wiggins*, the decision not to investigate further into the mitigating circumstances stemming from the childhood head injury was not reasonable.

Jefferson v. Hall, 570 F.3d at 1316.

C The Need for Supreme Court Clarification

The problem with the panel majority decision is that it creates a virtually

insurmountable obstacle to challenging a claimed decision by trial counsel to limit the investigation of potentially compelling mitigating evidence, no matter how clearly counsel is on notice that the evidence should be explored and no matter how profoundly a capital defendant is prejudiced by the failure to develop the evidence. If a "strong presumption of reasonableness" attaches to every investigative decision made by counsel and that presumption is "even higher" when experienced counsel is involved, presumably a "higher-than-strong presumption of reasonableness", then it is hard to imagine any failure to investigate which would not past constitutional muster. As the facts of this case reveal, counsel was indisputably on notice of a serious brain injury that could explain, not excuse, what was an irrational attack by Petitioner on a friend and co-worker, yet failed to even explore this evidence in lieu of a mitigation case never implemented. Nevertheless, Petitioner was still denied relief because the even compelling facts of his case cannot overcome the "even-higher-than-strong presumption of reasonableness" applied by the panel majority.

The panel majority's impregnable barrier to successfully raising an ineffective assistance of counsel claim to a decision to forego fruitful mitigation investigation is simply not the law and is contrary to decisions of this court from *Strickland v. Washington*, 466 U.S. at 690-91, to *Wiggins v. Smith*, 539 U.S. at 527-28, to *Rompilla v. Beard*, 545 U.S. at 380-81, and *Porter v. McCollum*, 130 S.Ct. at 452 -53. The simple question is whether the decision not to pursue a mitigation effort after "less than complete

investigation" is itself "reasonable," that is "whether the known evidence would lead a reasonable attorney to investigate further." *Strickland v. Washington*, 466 U.S. at 690-91, *Wiggins v. Smith*, 539 U.S. at 527. It is not some sort of "super-unreasonableness" standard as advanced by the panel majority.

In addition, in judging whether a decision to limit investigation in favor of a claimed different, inconsistent mitigation strategy is reasonable, the teachings of this Court in *Wiggins* is that courts must look to whether in fact an alternative strategy was actually employed.[18] After all in *Wiggins*, this Court rejected a claim that the failure to conduct a complete investigation of the defendant's deprived and difficult childhood could be excused because of counsel's claimed strategic decision to argue as their case for life the limited role of the defendant in the charged murder. The Court rejected this rationale because the record showed that counsel's mitigation case and argument did not, in fact, focus on "the defendant's role in the offense" but instead was the same type of "half hearted mitigation case" that was presented here. *Wiggins v. Smith* 539 U.S. at 526. The claimed strategic decision was, as reflected in the record, merely an after-the-fact rationalization for counsel's deficient performance.

Here, however, the panel majority's "super-unreasonableness" standard allowed it to conclude that it was nevertheless sufficient for counsel to ignore Petitioner's obvious

---

[18]As the dissenting opinion of Judge Carnes demonstrated, the claimed strategy was not employed here.

brain injury and their own expert's written recommendation for further testing in lieu of a claimed residual doubt case never presented (Petitioner testified and never denied the crime and trial counsel conceded guilt in closing) or a mercy case (without any reason why mercy was due). This conclusion misapplied the settled law of this Court from *Strickland* thru *Wiggins, Rompilla* and *Porter*, by applying an unprecedented standard of review of counsel's conduct which would eviscerate the Sixth Amendment's guarantee of effective assistance of counsel. Because of this failure to aply the decisions of this Court to an important issue of Sixth Amendment jurisprudence, this Court should exercise its discretion and grant a Writ of Certiorari. *See* Supreme Court Rule 10(c).

As Judge Carnes, in his dissent aptly noted:

> Because Jefferson beat a man to death with a tree limb in the course of robbing him, the law demands that he suffer one of two severe punishments: life imprisonment or death. But the law also demands that he have a fair chance to persuade a jury that the less severe punishment is enough, and that requires effective assistance of counsel. Because Jefferson did not have effective assistance of counsel at sentencing, he has not yet had his fair chance.

Jefferson v. Hall, 570 F.3d at 1321.

CONCLUSION

Wherefore, Petitioner respectfully requests that the Court grant this petition.

Dated, this the 25th day of January, 2010.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 09- ____

LAWRENCE JOSEPH JEFFERSON
Petitioner,

versus,

STEPHEN UPTON, Warden,
Respondent.

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This is to certify that upon this date, I caused a copy of the forgoing to be served upon counsel for Respondent by placing a copy of same in the United States Mail, first class postage prepaid, and addressed as follows:

Ms. Beth Attaway burton, Esq.
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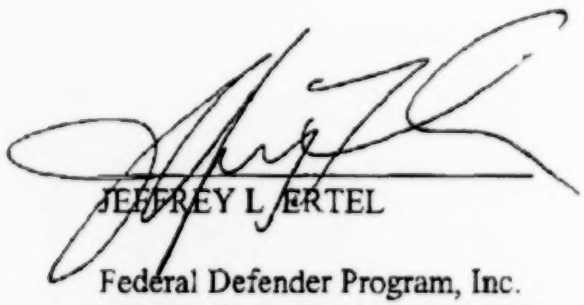
Dated, this the 25th day of January, 2010.



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OPPOSITION BRIEF

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No. 09-8852

IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE JOSEPH JEFFERSON,

PETITIONER,

v.

STEPHEN UPTON, WARDEN,
GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

I. SHOULD THIS COURT DENY PETITIONER'S REQUESTS FOR CERTIORARI REVIEW WHEN THE ELEVENTH CIRCUIT'S DENIAL OF PETITIONER'S INEFFECTIVENESS CLAIM IS IN DIRECT ACCORDANCE WITH THIS COURT'S HOLDINGS IN STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984) AND ITS PROGENY?

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BRIEF IN OPPOSITION
ON BEHALF OF RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Lawrence Joseph Jefferson, was indicted in the Superior Court of Cobb County, Georgia, on August 8, 1985 for the offenses of malice murder and armed robbery of victim Edward Taulbee.

Petitioner was represented at trial by experienced attorneys Stephen Schuster and Mark Cella. Mr. Schuster had attended the University of Georgia Law School and had passed the Bar in May of 1976. After law school, Mr. Schuster was employed as an Assistant Solicitor in Cobb County for two years from 1976 to 1978 and worked for the District Attorney's Office from 1978 until 1980. While in the District Attorney's Office, Mr. Schuster was a lead trial attorney and supervised a team of three trial attorneys, prosecuting every type of felony including sex crimes and murders. While Mr. Schuster participated in cases in which the State was seeking the death penalty, he was not the lead attorney in those cases.

After going into private practice in 1980, Mr. Schuster handled both criminal and civil litigation, and since March of 1986, over half of his practice was criminal practice. Mr.

Schuster testified that he always kept a caseload of at least 10 or 11 active felony cases, sometimes handling as many as 20 active felony cases at a time. Mr. Schuster also testified that Petitioner's case was his first death penalty case as lead counsel and that he was appointed to represent Mr. Jefferson during September of 1985.

At Mr. Schuster's request, attorney Mark Cella came into the case after Petitioner was indicted, as two people were always appointed to represent someone charged with murder in Cobb County. Mr. Cella graduated from Emory Law School and began working as an Assistant Solicitor in the Cobb County Solicitor's Office in February of 1982, where he worked for three years. During his time as an Assistant Solicitor, Mr. Cella initially prosecuted traffic offenses and then tried over 50 jury trials. In 1984, Mr. Cella went into private practice.

Petitioner was tried before a jury on February 24 through March 9, 1986, and was convicted of felony murder, with the underlying felony being armed robbery. Following the penalty phase of trial, the jury found the existence of the following statutory aggravating circumstances: (1) that the murder of Edward Taulbee was committed by the defendant while the defendant was engaged in the commission of a capital felony, to-wit: armed robbery; and (2) that the murder of Edward Taulbee

was outrageous, wantonly vile, horrible and inhuman in that it involved aggravated battery. On March 9, 1986, Petitioner was sentenced to death for felony murder. Petitioner filed a motion for a new trial and an amendment thereto, which were denied on June 20, 1986.

Petitioner then appealed to the Supreme Court of Georgia, which affirmed Petitioner's conviction and death sentence on March 3, 1987. Jefferson v. State, 256 Ga. 821, 353 S.E.2d 468 (1986). Petitioner's motion for reconsideration was denied on March 24, 1987. Petitioner then filed a petition for writ of certiorari in this Court, which was denied on October 5, 1987. Jefferson v. Georgia, 484 U.S. 872 (1987).

On December 23, 1987, Petitioner filed a state habeas corpus petition. A state habeas corpus evidentiary hearing was held on April 22-23, 1991 and the state habeas corpus court denied relief to Petitioner on September 30, 1992. Utilizing the standard of Strickland v. Washington, 466 U.S. 668 (1984), the state habeas corpus court rejected Petitioner's claim of ineffectiveness by finding as follows: "In conclusion, the record shows that trial counsel more than vigorously represented their client at trial after thoroughly investigating the case and presenting the only viable defenses they determined were

available. Petitioner has failed to establish attorney error and prejudice under the standard of Strickland v. Washington."

On November 16, 1992, Petitioner filed an application for certificate of probable cause to appeal in the Georgia Supreme Court. The Georgia Supreme Court granted Petitioner's application for certificate of probable cause to appeal on December 18, 1992. Both parties submitted briefs and the Georgia Supreme Court affirmed the ruling of the state habeas corpus court denying relief to Petitioner on June 28, 1993. Jefferson v. Zant, 263 Ga. 316, 431 S.E.2d 110 (1993). In affirming the denial of relief on Petitioner's sentencing phase ineffective assistance claim, the Georgia Supreme Court specifically found that the record showed that "Jefferson's counsel investigated the possibility of mental mitigation and concluded that there was nothing substantive to develop. The record supports the finding that Jefferson's counsel did not believe, and had no reason to believe, that Jefferson suffered mental deficiencies that could have been exploited in mitigation." Jefferson v. Zant, 263 Ga. 316, 320 (1993).

The Georgia Supreme Court's further held the following in rejecting Petitioner's sentencing phase ineffectiveness claim:

> Although other attorneys might have explored the mental issue further, we cannot conclude that the investigation by and tactical judgment of Jefferson's attorneys was outside the wide range of reasonably effective assistance. Strickland v. Washington, 466 U.S. 668 (104 S. Ct. 2052, 80 L. Ed. 2d 674) (1984). Since we agree with the habeas court that there was no deficient attorney performance, we need not address the issue of prejudice.

Jefferson v. Zant, 263 Ga. at 320, *cert denied*, Jefferson v. Zant, 511 U.S. 1046 (1994).

On April 23, 1996, Petitioner filed an application for federal habeas corpus relief. A federal habeas corpus evidentiary hearing was held on February 21, 2001 and February 22, 2005. On May 10, 2007, the federal habeas corpus court granted Petitioner relief as to "Petitioner's claim that trial counsel was ineffective during the penalty phase of trial," while denying all of the other claims raised in the petition.

Respondent appealed to the Eleventh Circuit Court of Appeals and Petitioner cross-appealed. On June 12, 2009, the Eleventh Circuit reversed the erroneous grant of federal habeas relief to Petitioner as to his sentence and affirmed the denial of federal habeas relief as to Petitioner's conviction.

STATEMENT OF THE FACTS

On the morning of May 2, 1985, two construction inspectors from Cobb County, Georgia, who were crossing a bridge over Lake Allatoona, observed the body of the victim, Edward Taulbee, lying in the woods near the lake. The two inspectors then notified the Cobb County Police who immediately went to the crime scene and preserved the area.

The victim was found wearing a yellow shirt, overalls and work boots. A large log was lying across the victim's head. Police officers found two large sticks or clubs near the victim's body and observed that the victim's head had been driven into the ground, apparently by the log. One of the sticks was shattered and had hair and blood on it. Police could not find a wallet on the body of the victim.

The police later determined that the victim worked for the Zenith Construction Company in Cobb County. The police investigation disclosed that the Petitioner also worked for Zenith Construction Company and that the victim was Petitioner's supervisor. During the investigation it was also discovered that both the Petitioner and the victim had been paid on May 1, 1985, and that the victim and the Petitioner had been working at a Cobb County job site as late as 4:00 p.m. on the afternoon of May 1, 1985. It was further determined that the Petitioner had

borrowed money from the victim at some point prior to the victim's murder and that the Petitioner had arrived late to work on the day of May 2, 1985. It was also learned that Petitioner and the victim often rode to work together in the victim's green Duster.

The police interviewed Petitioner on May 2, 1985. Petitioner told the authorities that he had seen the victim leave work and go fishing on May 1, 1985, but that he had not gone with the victim to go fishing on that day. Petitioner told the authorities that on May 1, 1985, he had gone home directly from work. Petitioner admitted that he owed the victim money and that he was to pay the victim back on May 1, 1985, but stated he had not paid the victim back because he had not gotten his pay check. During the course of the interview, the Petitioner appeared to be nervous.

A neighbor of Petitioner informed the authorities that on May 1, 1985, she had seen Petitioner and the victim leave from Petitioner's apartment to go fishing. The neighbor also stated that later that day she observed Petitioner return to his apartment without the victim. The neighbor also stated that on May 2, 1985, Petitioner came to her apartment and gave her an automatic teller bank card and asked the witness to get rid of

the card. Petitioner also gave the witness a fishing tackle box.

Another neighbor of Petitioner told the authorities that on May 1, 1985, he had gone to Petitioner's apartment after 6:00 p.m., and that Petitioner had locked the door to his apartment although the Petitioner was inside, which the neighbor stated was unusual. The neighbor further testified that Petitioner was acting funny and that the Petitioner's chest appeared to be red. The neighbor also testified that Petitioner had, prior to the murder, made statements about hitting his boss in the head and that, after the murder, Petitioner informed the neighbor that his (Petitioner's) "little fat buddy was dead."

The neighbor further testified that, on the evening of May 1, 1985, Petitioner stated he had lost his wallet and went out to look for it, although the neighbor later found the wallet in Petitioner's apartment with approximately $100.00 in cash in the wallet.

A third neighbor of Petitioner testified that on the night of May 1, 1985, he took Petitioner to buy marijuana and liquor. The neighbor also testified that Petitioner told him he had lost his wallet and asked the neighbor to drive him to Lake Allatoona to find it. The neighbor then took Petitioner to Lake Allatoona where Petitioner got out of the car in the same area where the

body was later found. Petitioner returned approximately ten minutes later with a bucket containing numerous fishing items and also with a fishing pole. The neighbor then took Petitioner to an automatic teller machine where Petitioner, wearing a straw hat and glasses, attempted unsuccessfully to withdraw some money from the bank. Prior to going to the automatic teller, Petitioner asked the neighbor if the automatic teller machine took pictures of those people who used the machines.

On May 7, 1985, the victim's car was located in the parking lot of a food store in Cobb County. At the time the car was found, the windshield wipers were stuck in the up position, indicating that the car had been driven and parked at a time when it had been raining. It was determined that it had been raining on May 1, 1985. The parking lot where the car was located was close to the Petitioner's residence. The authorities also found the keys to the car inside the automobile. The authorities found a twenty-four hour automatic teller transaction receipt in the glove compartment and determined that the receipt was dated May 2, 1985, at approximately 1:07 a.m.

The bank card, which had earlier been given to one of the Petitioner's neighbors, was subsequently recovered. The victim's name was on that card. The authorities also located

other fishing paraphernalia which had belonged to the victim. Petitioner had apparently attempted to dispose of these fishing items.

Petitioner was arrested on May 7, 1985. Petitioner was given Miranda warnings and transported to the police station where he was again given Miranda warnings. Petitioner stated, when asked why he had killed the victim that "he (Petitioner) did not need to be around other people, that he wanted to be executed, and that he wanted to be put to sleep."

Investigation revealed that the victim had cashed his pay check on May 1, 1985, receiving $223.15. It was proven that Petitioner, who was paid on May 1, 1985, did not cash his paycheck until May 3, 1985, and at that time he received approximately $136.21. The authorities also determined that in the early morning hours of May 2, 1985, someone attempted to use the victim's twenty-four hour bank card to make a withdrawal.

An autopsy was conducted on the body of the victim on the day following the discovery of the body. The medical examiner testified at Petitioner's trial that the back of the victim's shirt collar was soaked with blood, but there were no blood splatters on the clothes of the victim. The examination of the body disclosed that the victim suffered approximately two lacerations above his left eyebrow, one laceration on his

forehead, one laceration above his right ear and five lacerations on the back of his scalp. The autopsy also disclosed that the victim suffered four fractured teeth, an abrasion across his face, an abrasion across his back, a skull fracture, brain bruises and brain hemorrhaging.

It was the opinion of the medical examiner that the lacerations had been caused by a rough object, and that the injuries were consistent with those caused by the wooden sticks or clubs found near the body of the victim. The examination of the clubs disclosed that Caucasian hair fibers, consistent with hair fibers of the victim, were found on the clubs. The medical examiner further testified that the cause of death was the head and brain injuries to the victim, and that the victim had probably died sometime between 5:00 p.m. and 11:00 p.m. on May 1, 1985. The medical examiner also testified that it was his opinion that the victim was probably knocked to the ground by the blows to the head, and that the log was then dropped on the victim's head, driving the victim's face into the ground.

Petitioner did not testify or present any evidence during the guilt phase. The jury found Petitioner guilty of felony murder and armed robbery.

With regard to the sentencing phase evidence presented by trial counsel, the Eleventh Circuit Court of Appeals found as follows:

> In mitigation, Jefferson presented the testimony of two Cobb County deputies, his mother, one of his sisters, the mother of his two children, and his own testimony. [] The employees of the Cobb County Sheriff's Department generally testified that Jefferson had caused no problems since his incarceration. [].
>
> Jefferson's mother, Vera Jefferson, testified about his difficult childhood, which included growing up without a father and taking care of his siblings. [] She testified that Jefferson was responsible, generous, gentle, and kind, loved people and was very playful as a child. [] She mentioned to the jury that Jefferson was injured at the age of two when a car ran over the top of his head, but she was not questioned and did not offer any testimony regarding the impact, if any, that the accident had on him. [] Jefferson's mother asked the jury to have mercy on her son. []
>
> Jefferson's sister, Rita Jefferson, also testified about Jefferson's generosity and sense of responsibility. [] She explained to the jury that Jefferson would get her and her sisters ready for school, take them to school, bring them home from school, prepare them for bed, and take them to church. [] She added that he helped her with her sons. [] She testified about Jefferson being in the Navy and later attending vocational/technical school. [] Linda Dale, the mother of Jefferson's two children, testified that Jefferson was a good father, who was responsible and liked to work. [] She also said that he continued to have a relationship with his children, even though he was in jail, and that she loved him. []
>
> Jefferson then testified. He discussed his difficult upbringing without a father, how he helped his mother raise his siblings, and his decision to leave high school to help make money for his family. [] He

testified that he loved his children and never abandoned them, and contrary to the State's insinuations, he explained that he paid child support directly to his children's mother, though not to the court. [] He also explained that he had moved to Georgia to find work, and would send money to his family. []

Jefferson then responded to the list of past crimes the State had introduced against him -- including his armed robbery conviction, as well as his arrests for disorderly conduct, marijuana possession, attempted burglary of a house, theft by taking, harassment, and burglary of a service station -- attempting to explain them away. [] As for the armed robbery conviction, he said that he had been joyriding with his friends, and had not participated in any of the four robberies that supposedly happened that day, and had gotten in the car with them just before the police pulled it over. [] He explained that he had nonetheless pled guilty to the one armed robbery count because he was concerned that he would be charged for the other robberies and could not afford an attorney to fight the charge. [] As for the other arrests, Jefferson generally claimed that he had not committed most of the crimes, but he had been in the wrong place at the wrong time. []

Jefferson also detailed his schooling and job experiences, saying that he had received his GED while in prison, and had gone on to become certified in masonry, welding, and auto body work. [] He admitted that he had been expelled from junior high school for hiding in the gym while the girls were in there and other "goofy stuff." [] He further explained that he was dishonorably discharged from the Navy after three and a half years because he returned late from leave when his mother was sick. [] Finally, Jefferson denied telling the police that he wanted to be executed. []

Jefferson v. Hall, 570 F.3d 1283, 1290-1292 (11th Cir. 2009) (citations omitted).

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. CERTIORARI REVIEW SHOULD BE DENIED AS THE ELEVENTH CIRCUIT'S DENIAL OF PETITIONER'S INEFFECTIVENESS CLAIM IS IN DIRECT ACCORDANCE WITH STRICKLAND.

The Court of Appeals decision is in direct accordance with Strickland v. Washington, 466 U.S. 668 (1984) and its progeny and presents no issue warranting the grant of certiorari review.

A. Relevant Legal Findings

In reviewing Petitioner's claim of ineffective assistance of counsel, the Eleventh Circuit properly utilized Strickland and determined that Petitioner had failed to establish deficient performance to support his claim.

The Court of Appeals first noted trial counsel's past criminal experience. Jefferson v. Hall, 570 F.3d 1292.

Thereafter, in analyzing trial counsel's performance for the sentencing phase of trial, the Eleventh Circuit found that trial counsel investigated Petitioner's life history. Id. As found by the Court of Appeals, Petitioner drafted up a biography setting out his upbringing, his schooling, job history and his discharge from the Navy as well as listing his family members. Jefferson v. Hall, 570 F.3d at 1293-1294. Petitioner "did not mention a head injury in the biography." Jefferson v. Hall, 570

F.3d at 1293. However, trial counsel ultimately learned that Petitioner had a head injury at age two. Id.

Additionally, as part of their investigation, trial counsel obtained funds to travel to Louisville, Kentucky, Petitioner's hometown. Id. Trial counsel "met with Jefferson's mother and the family members she had gathered, securing a history from each of them. [] They were able to meet with most of the people Jefferson recommended." Jefferson v. Hall, 570 F.3d at 1293. Trial counsel also went to the courthouse in Louisville to obtain Petitioner's prior records and met with Petitioner's probation officer. Id.

Petitioner's counsel also requested to have an independent mental health expert evaluate Petitioner. Jefferson v. Hall, 570 F.3d at 1293-1294. Trial counsel testified, "[w]e didn't want to use the State Psychologist, Georgia Forensic Psychologist, and we needed somebody who could testify for us at the sentencing phase if need be." Id. In November 1985, trial counsel hired one of the doctors recommended by the ACLU, Dr. Gary Dudley. Id. With regard to Dr. Dudley, the Eleventh Circuit held as follows:

> Dr. Dudley met with Jefferson four times during December 1985. [] Following his examinations, Dr. Dudley submitted a written report to Jefferson's counsel stating that Jefferson's test results were consistent with attention-deficit disorder and that

> the "magnitude of his deficiencies is quite mild, and in no way impair[s] his judgment or decision-making capacity." [] Dr. Dudley further opined: [T]his is an individual of average intelligence, apparently from a family environment that was involved in some violence (father reportedly killed in an argument) and whose adulthood has included participation in a robbery at gunpoint. His psychological status at the time of my evaluation is non-psychotic, but he does present with very immature ego functions and tenuous ego integration. His major personality deficits seem centered around identity issues and the failure to achieve a coherent sense of self. This, in conjunction with great immaturity of ego functions generally, renders him prone to various forms of acting out, with very little mitigating personality structures and dynamics. There is no evidence in the test record to suggest that he has experienced a previous level of psychotic impairment. One possibility that could not be explored because of his incarceration has to do with the sequelae to head injury experienced during childhood. In my opinion, it would be worthwhile to conduct neuropsychological evaluation of this individual to rule out an organic etiology. Because he denies the alleged crime, exploration of explosive personality disorder is not pursued. However, he denies a history involving significant amounts of violence. []

Jefferson v. Hall, 570 F.3d at 1294-1295. (Citations omitted). (Emphasis added).

Thereafter, the Court of Appeals reviewed trial counsel's investigation after receiving this report. The Court concluded that both trial attorneys testified in the state habeas proceedings that they spoke with Dr. Dudley about his report and concluded that Dr. Dudley's testimony would not be helpful at trial and further investigation was not necessary.

Specifically, the Court held:

> Cella and Schuster spoke with Dr. Dudley about his findings, and "whether he would help or hurt us on the stand and whether we should call him to help our case." [] Cella determined that "Dr. Dudley's report conclude[d] and he suggested that he would hurt us more than help us if we did call him," and additionally, that Dr. Dudley did not have "anything to say that would help our defense ... [b]ecause of his conclusion that Lawrence's mental deficiencies did not prevent him from understanding right from wrong, did not impair his judgment or his decision-making capabilities, and that he was non psychotic." [] Cella further believed that a neuropsychological evaluation was unnecessary because they were "proceeding on the defense that Lawrence gave us, which was that he was an eyewitness to this incident." []
>
> Counsel Schuster reached essentially the same conclusions about Dr. Dudley's assistance. Dr. Dudley "basically" told him that "[t]here is nothing I could testify to that would help you, if you get to the sentencing phase in Lawrence's case." Dr. Dudley said that he had worked in prison psychology in Florida and that "Lawrence was just a criminal." Schuster specifically asked Dr. Dudley about his recommendation for neuropsychological testing, and Dr. Dudley "basically said it may be a waste of time because the rest of the report ... said that he was non psychotic, that he was intelligent, he had a fairly high I.Q., and ... '[b]ecause he denies the alleged crime.'" [] According to Schuster, Dr. Dudley didn't pursue it and we saw no reason to further pursue it." []

Jefferson v. Hall, 570 F.3d at 1295. (Citations omitted).

The Eleventh Circuit did note that Dr. Dudley gave an affidavit in the state habeas proceedings alleging that he did not suggest to trial counsel "that a neuropsychological evaluation would not be necessary or that it would not be

worthwhile" and "denied telling Schuster that Jefferson was 'just a criminal,' and that he could not help them at trial." Jefferson v. Hall, 570 F.3d at 1295. However, the Eleventh Circuit held:

> In any event, both Schuster and Cella testified at the state habeas hearing that they did not pursue further testing based on Dr. Dudley's report and their conversations with him, [], as well as on their interactions with Jefferson. Cella noted that he never had any problems communicating with Jefferson, Jefferson had a good vocabulary, understood his questions, and even paid child support. [] Indeed, Cella said that he "never saw any evidence that Lawrence was brain damaged" and saw no reason to pursue a mental health defense further. [] Cella said that he "didn't think [Dr. Dudley] had anything to say that would help our defense." [] Cella also believed that, even assuming a brain damage defense existed, it would have been inconsistent with Jefferson's claim that he did not commit the crime.
>
> Schuster likewise testified that Jefferson never showed any evidence of brain injury: he had a good record in the Navy during his three and a half years of service; had a "pretty good work history that we used," which included Jefferson's job at a scale company where he was certified in making sure the scales were fixed and weighed properly; was "always very calm and always extremely helpful"; put together a biography for them that "pretty much listed everything"; kept good notes; helped coordinate interviews with his family and co-workers; gave them information about Mitchell and the Glades; and "was very workable within the sense that he helped us in any way he could to prepare the defense." [] Schuster continued:
>
> > We had no indication, through our dealings with him, that there were any problems with explosive personality or anything like that …. I mean, there was nothing in our day-to-day

> relationship with Lawrence that would lead us to go further with [the mental health investigation]. We didn't have any problem. He kept good notes and helped us out. If there was something, I must have missed it. []

Jefferson v. Hall, 570 F.3d at 1295-1296. (Citations omitted).

The Eleventh Circuit then found that trial counsel, based on their investigation for the sentencing phase, chose to minimize Petitioner's past offenses and concentrate on Petitioner's good character and a residual doubt defense. Jefferson v. Hall, 570 F.3d at 1296.

The Eleventh Circuit reviewed the state courts' decisions and noted that the state habeas court had found that trial counsel: talked with Dr. Dudley about his report; discussed with Dr. Dudley the suggestion that "a neuropsychological evaluation be conducted 'to rule out an organic etiology,'"; that "Dr. Dudley led Mr. Schuster to believe that further investigation would simply be a waste of time because Petitioner was not psychotic, was intelligent and had a fairly high I.Q."; and based upon the report and conversations with Dr. Dudley, trial counsel determined not to have further neuropsychological testing done. Jefferson v. Hall, 570 F.3d at 1297.

The Eleventh Circuit further noted that trial counsel testified that during their interactions with Petitioner, and even though they were aware of the past head injury, they "saw

no other basis for pursuing a mental health defense." Jefferson v. Hall, 570 F.3d at 1295-1296, 1297.

The Court noted that the state habeas court found that "Jefferson's counsel did not call Dr. Dudley as a defense witness because 'they determined Dr. Dudley had nothing helpful in mitigation.'" Jefferson v. Hall, 570 F.3d at 1298.

As noted by the Eleventh Circuit, the state habeas court credited trial counsel's testimony with regard to their conversations with Dr. Dudley and concluded that trial counsel's decision to forego presentation of a mental health defense and further testing was strategic based on their investigation.

The Eleventh Circuit then reviewed the Georgia Supreme Court's findings with regard to Petitioner's claim of ineffective assistance of counsel. The Eleventh Circuit noted the following findings of the Georgia Supreme Court:

> The report did suggest that a neuropsychological evaluation might be "worthwhile … to rule out an organic etiology." However, in subsequent telephone conversations with Jefferson's attorneys, the psychologist indicated that further examination would not likely be beneficial because Jefferson did not have serious mental problems and was of normal intelligence. Counsel explained that in light of this advice, as well as their own observations of Jefferson and Jefferson's adamant assertion that he had not committed the crime, they concluded that there was no reason to explore further any mental issue, or to call the psychologist to testify in mitigation.

. . .

> Jefferson's counsel investigated the possibility of mental mitigation and concluded that there was nothing substantive to develop. The record supports the finding that Jefferson's counsel did not believe, and had no reason to believe, that Jefferson suffered mental deficiencies that could have been exploited in mitigation.
>
> . . .
>
> Although other attorneys might have explored the mental issue further, we cannot conclude that the investigation by and tactical judgment of Jefferson's attorneys was outside the wide range of reasonably effective assistance. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Since we agree with the habeas court that there was no deficient attorney performance, we need not address the issue of prejudice.

Jefferson v. Hall, 570 F.3d 1283, 1299 (11th Cir. 2009).

Thereafter, the Eleventh Circuit found that Petitioner's case was filed prior to the enactment of the AEDPA, and thus "questions of law and mixed questions of law and fact resolved by state habeas courts are reviewed *de novo*, while the state courts' factual findings are 'subject to the presumption of correctness.'" Jefferson v. Hall, 570 F.3d at 1300, quoting Freund v. Butterworth, 165 F.3d 839, 861 (11th Cir. 1999). However, the Court further held that these factual findings may be disregarded if they are "not fairly supported by the record." Id., citing Jackson v. Herring, 42 F.3d 1350, 1366 (11th Cir. 1995).

B. **Analysis in Direct Accordance With *Strickland***

The Eleventh Circuit's finding that Petitioner had failed to establish that trial counsel performed deficiently in investigating his mental health is in direct accordance with this Court's holding in Strickland and it progeny.

The Eleventh Circuit first reviewed the state courts' findings that Petitioner did not establish that trial counsel performed deficiently as trial counsel's decision to forego a mental health defense and further testing was based on a reasonable strategic decision after a thorough investigation. Specifically, the Eleventh Circuit held:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. Strickland, 466 U.S. at 690-91; accord Knowles, 129 S. Ct. at 1420.

Thus, "even when trial counsel's investigation and presentation is less complete than collateral counsel's, trial counsel has not performed deficiently when a reasonable lawyer could have decided, under the

> circumstances, not to investigate or present particular evidence." Grayson v. Thompson, 257 F.3d 1194, 1225 (11th Cir. 2001); see also Wiggins, 539 U.S. at 523 ("[O]ur principal concern ... is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the petitioner's] background was itself reasonable.") (emphasis omitted). If "we conclude that declining to investigate further was a reasonable act, we do not look to see what a further investigation would have produced." Rogers v. Zant, 13 F.3d 384, 388 (11th Cir. 1994).

Jefferson v. Hall, 570 F.3d 1301.

Thereafter, the Eleventh Circuit reiterated Strickland's strong presumption in favor of trial counsel's effectiveness holding:

> In reviewing a lawyer's professional judgments, "[a] decision to limit investigation is 'accorded a strong presumption of reasonableness.'" Mills v. Singletary, 63 F.3d 999, 1021 (11th Cir. 1995) (quoting Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir. 1987)); see also Strickland, 466 U.S. at 690 ("counsel is strongly presumed to have rendered adequate assistance and having "made all significant decisions in the exercise of reasonable professional judgment"). Indeed, our standard is a high one -- "[e]ven if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so." Rogers, 13 F.3d at 386 (emphases added); Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000) (*en banc*) ("And because counsel's conduct is presumed reasonable, for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take."). The standard is even higher where experienced counsel is involved. See Chandler, 218 F.3d at 1316 ("When courts are examining the

> performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.").

Jefferson v. Hall, 570 F.3d at 1301-1302.

The Eleventh Circuit, properly utilizing Strickland, determined that trial counsel's determination not to have further testing conducted or to present a mental health defense was not constitutionally ineffective. The Court based this conclusion on its findings that trial counsel "conducted an extensive investigation into both the details of the crime and Jefferson's life history." Jefferson v. Hall, 570 F.3d at 1302. Just as the state courts found, the Eleventh Circuit also noted trial counsel's interaction with Petitioner gave trial counsel no indications that his mental health should be investigated. Id. However, as further noted by the Court, counsel did not end their investigation there, but consulted with experienced death penalty litigators and "despite the fact that counsel saw no evidence of any mental health problems in their many interactions with Jefferson, counsel took the additional precaution of requesting a psychological evaluation of Jefferson." Jefferson v. Hall, 570 F.3d at 1303.

The Eleventh Circuit found that Dr. Dudley evaluated Petitioner and prepared a report; however based on their reports and conversations with Dr. Dudley, trial counsel made a

reasonable, strategic decision not to present mental health at trial or have Petitioner further evaluated. The Eleventh Circuit found that Dr. Dudley's "report, and their conversations with Dr. Dudley, gave Jefferson's counsel precious little to work with." Id. As found by the state courts and the Eleventh Circuit, the report "concluded that Jefferson was in the middle range of intelligence, that the magnitude of his deficiencies was quite mild, and in no way impaired his judgment or decision-making capacity, and that he was not psychotic." Jefferson v. Hall, 570 F.3d at 1303. The Eleventh Circuit did find that the report also mentioned a head injury that Petitioner suffered in childhood and that "it would be worthwhile to conduct neuropsychological evaluation of [Jefferson] to rule out an organic etiology." Id. However, the Eleventh Circuit, giving proper deference to the state courts' factual findings, found as follows:

> The state court found, when counsel spoke directly with Dr. Dudley specifically about whether to explore that "possibility," he "led Mr. Schuster to believe that further investigation would simply be a waste of time." [] In conversation, Dr. Dudley also remarked upon his experience as a psychologist in a Florida prison and stated that, in his opinion, Jefferson was "just a criminal." [] In light of their conversations with Dr. Dudley, Jefferson's counsel elected not to conduct further testing, and instead presented an innocence defense at trial. Based on these factual findings of the state habeas courts -- all of which are fairly supported by the record -- we believe that Jefferson's

counsel were reasonable in deciding not to pursue neuropsychological testing.

Jefferson v. Hall, 570 F.3d at 1303-1304.

The Eleventh Circuit also noted that Petitioner "has not argued that any of the state courts' factual findings were 'not fairly supported by the record,' and thus, they are likewise 'entitled to a presumption of correctness.'" Jefferson v. Hall, 570 F.3d at 1304, n. 8. In this regard, the Court held:

> We recognize that Jefferson notes that "[t]he state habeas court's 'fact-finding' is dubious at best," Red Brief at 31 n.10, describing how the state court's order mentions a witness as not credible, even though that witness did not actually testify, and asks this Court to "harbor serious doubts about the findings of fact and credibility determinations in the state court record." However, Jefferson does not point to any particular factual finding that was clearly erroneous, and Jefferson even says in the argument section of his brief that "[t]he relevant facts are not in dispute." []

Id.

"Counsel's decision not to explore the [mental health] matter further was based on several sound reasons rooted in the facts and circumstances of this case." Jefferson v. Hall, 570 F.3d at 1304. The Eleventh Circuit concluded as follows:

> In sum, since the state habeas courts' findings of fact are fairly supported by the record, and according them, as we must, a strong presumption of correctness, and evaluating the reasonableness of counsel's performance from counsel's perspective at the time, Strickland, 466 U.S. at 690; Chandler, 218 F.3d at 1316-17, we conclude that the performance of

Jefferson's counsel at the penalty phase of his trial was reasonable. Counsel's decision not to pursue neuropsychological testing was, as the state courts unambiguously found, a considered judgment, made only after substantial inquiry, not an oversight or the result of an arbitrary whim. Jefferson's counsel carefully weighed various options, and, based on their substantial experience as criminal law practitioners, exercised their professional judgment about the most promising route to pursue. This mode of calculation and deliberation embodies the essence of "reasonableness." In the words of the Supreme Court, Jefferson's counsel made "strategic choices … after less than complete investigation" that were supported by "reasonable professional judgments," and were "determined or substantially influenced by the defendant's own statements" that he was innocent. Strickland, 466 U.S. at 690-91. Even if another lawyer might have taken a different tack, we cannot say that no reasonable lawyer would have made the decisions Schuster and Cella made. Rogers, 13 F.3d at 386. We, therefore, conclude that the state habeas courts were correct in holding that Jefferson's counsel were not constitutionally ineffective.

> We do not -- as the dissenting opinion suggests -- rest our decision solely, or even mainly, on counsel's decision to pursue a residual doubt defense at sentencing, but rather, on the many reasons enumerated in this opinion, including: (1) counsel's own experience as criminal attorneys and their request for advice from seasoned capital attorneys; (2) counsel's thorough investigation into the crime and Jefferson's life history, which revealed many weaknesses in the State's circumstantial case, Jefferson's record in the Navy, a "pretty good work history," and, notably, no record of any explosive behavior; (3) Dr. Dudley's written report and oral comments to counsel, which, as the state courts found, led counsel to believe that further investigation "would be a waste of time"; (4) counsel's interactions with Jefferson himself, who was "always very calm and always extremely helpful," helped coordinate interviews

> with his family and co-workers, gave counsel information about the State's witnesses, had a good vocabulary, understood counsel's questions, and "was very workable within the sense that he helped us in any way he could to prepare the defense"; (5) Jefferson's "adamant" insistence that he was innocent of the crime; and (6) the costs of switching defenses at sentencing, which may have lost credibility with the jury and affected Jefferson's decision to testify. In this respect, it was reasonable for counsel to believe that evoking sympathy or asking the jury for mercy did not involve an explicit admission of guilt; and surely, not to the same degree as a neurological defense would have. It is one thing to plead for mercy and quite another to say, "I committed a particularly brutal murder, but did so only because of organic brain injury."

Jefferson v. Hall, 570 F.3d at 1306-1307.

These findings are in direct accordance with this Court's holdings in Strickland and its progeny. Strickland's bedrock principle that courts' "must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance" (466 U.S. at 689) is without question and was specifically applied by the state courts and the Eleventh Circuit in the instant case.

Petitioner argues that the Eleventh Circuit created a higher standard of reasonableness by noting that greater credence is given to the presumption when trial counsel are experienced. However, this Court specifically held in Strickland v. Washington, 466 U.S. at 681, "[a]mong the factors

relevant to deciding whether particular strategic choices are reasonable **are the experience of the attorney**, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense." (Emphasis added).

Following this Court's holding that the experience of trial counsel is a factor when reviewing the reasonableness of counsel's performance, the Eleventh Circuit has held, "When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger." Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000), citing Provenzano, 148 F.3d at 1332 and Burger v. Kemp, 483 U.S. 776, 779-780 ("reciting counsel's impressive credentials in opinion finding that counsel rendered effective assistance").

Contrary to Petitioner's argument that consideration of trial counsel's experience creates an "insurmountable obstacle," (Petitioner's petition, p. 37), the Eleventh Circuit further noted in Chandler with regard to giving deference to trial counsel's experience:

> We accept that even the very best lawyer could have a bad day. No one's conduct is above the reasonableness inquiry. Just as we know that an inexperienced lawyer can be competent, United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 2050, 80 L. Ed. 2d 657 (1984)

> (inexperienced does not mean ineffective), so we recognize that an experienced lawyer may, on occasion, act incompetently. **Our point is a small one: Experience is due some respect.**

Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000). (Emphasis added). See also Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994) ("A reasonably competent attorney often must rely on his own experience and judgment, without the benefit of a substantial investigation, when deciding whether or not to forego a particular line of defense.").

Moreover, as is specifically made clear from the Eleventh Circuit's opinion, the Court did not rely solely on trial counsel's experience to determine that trial counsel had not performed deficiently in their investigation of Petitioner's mental health. Instead, the Court specifically set out that trial counsel relied on the report of Dr. Dudley, their conversations with Dr. Dudley, their "frequent" interactions with Petitioner, Petitioner's repeated assertions that he was innocent and the weakness of the State's case in determining not to further pursue an investigation into Petitioner's mental health. Jefferson v. Hall, 570 F.3d at 1306, n. 9.

As the Eleventh Circuit's holding is squarely in accordance with this Court's holding in Strickland and its progeny, this Court should deny Petitioner's petition for certiorari review.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court deny the instant petition for a writ of certiorari seeking review of the decision of the Eleventh Circuit denying federal habeas corpus relief to Petitioner as to his claims of ineffective assistance of counsel.

Respectfully submitted,

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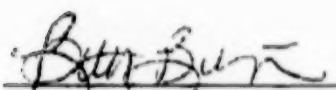

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

Respondent certifies that the instant brief is typed in 12 point Courier New, and contains 7,270 words as determined by the word-processing system used to prepare the brief.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing pleading, prior to filing the same, by depositing a copy thereof in the United States Mail, properly addressed upon:

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DEATH PENALTY CASE
No. 09-8852

IN THE

SUPREME COURT OF THE UNITED STATES

LAWRENCE JOSEPH JEFFERSON

Petitioner,

v.

STEPHEN UPTON, WARDEN,

Respondent.

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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IN THE

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LAWRENCE JOSEPH JEFFERSON,

Petitioner,

v.

STEPHEN UPTON, Warden,

Respondent,

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

Petitioner Lawrence Joseph Jefferson, pursuant to Rule 15(6) of the Rules of the Supreme Court of the United States, hereby files his Reply Brief to the Brief in Opposition on Behalf of Respondent to respond to Respondent's claims regarding the worthiness of this case for Supreme Court review by way of a writ of certiorari.

In the Brief in Opposition on Behalf of Respondent (the "Respondent's Brief"), the Respondent fails to come to grips with the essential argument made by Petitioner as to why this case merits Supreme Court review. While Petitioner would concede that "the experience of the (trial) attorney" may be "among the factors" to consider in determining the reasonableness of a

claimed strategic choice in representing a capital defendant, as this Court observed in Strickland v. Washington, 466 U.S. 668, 681 (1984), neither Strickland or any other ineffective assistance of counsel case decided by this Court would, as the Eleventh Circuit majority opinion did in this case, turn what this Court described as a "factor" into a "higher" presumption of reasonableness than would otherwise apply. Jefferson v. Hall, 570 F.3d 1283, 1302 (11th Cir. 2009).

Indeed, this Court has never announced a "presumption" with respect to investigatory decisions, such as the failure to investigate the potential of a capital defendant's significant brain injury, when, as in this case, there was every indication that such an injury may have occurred. Strickland talks about a presumption of reasonableness after a "thorough investigation of law and facts relevant to plausible options", but with respect to strategic choices made after less than a complete investigation, as here, the simple question is whether counsel made "a reasonable decision that makes particular investigations unnecessary" which, while "applying a heavy measure of deference to counsel's judgment", nevertheless "must be directly assessed for reasonableness in all the circumstances." Strickland, 466 U.S. 690-691.

Here, the Eleventh Circuit applied compounding levels of presumptions, a process never envisioned by Strickland or any other ineffective assistance of counsel case decided by this Court. Indeed, the Eleventh Circuit did not merely apply a presumption of reasonableness to the decision to forego what appeared to be a fruitful area of mitigation investigation, but layered onto that presumption an even "higher" presumption of reasonableness when so-called "seasoned" counsel are involved.[1] Jefferson v. Head, 570 F.3d 1283, 1301-1302 (11th Cir. 2009). By employing this super-reasonableness standard, any ineffectiveness claim is effectively doomed once the "experience" of trial counsel in the criminal justice system is recounted. This result is hardly what this Court intended in Strickland and its later ineffective assistance of counsel decisions.

It should not be ignored what the application of this double-layered presumption of reasonableness standard permitted in this case. Petitioner was convicted of killing a friend and

[1]In describing Petitioner's trial counsel as "seasoned", it should be remembered that there are different types of seasoning. While his trial counsel may have had substantial experience as prosecutors, neither had ever defended a death penalty case and the "experience" in defending a death penalty prosecution is much different from the "experience" in prosecuting a capital case. This is especially true with regard to the development of mitigation evidence, something that a prosecutor would never have occasion to do.

co-worker, from whom he had previously borrowed money without any incident, supposedly over a relatively miniscule amount of money and some fishing gear. While Petitioner protested his innocence, counsel clearly had a duty to explore any mitigation evidence which might help explain, although not excuse, the criminal acts with which the Petitioner was charged. See, Guideline 10.7 of the Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Here, counsel knew that Petitioner's head had been run over when he was only two years old. An indentation in the Petitioner's skull resulting from this injury was still clearly apparent. Petitioner described this injury when he was first arrested by the police and Petitioner's mother had told counsel about it. She even testified during the penalty phase regarding this injury, without further comment or any expert testimony to explain its impact. When Petitioner was evaluated by a psychologist, the psychologist recommended in his written report that further neuropsychological testing be conducted with respect to this injury. As the psychologist explained in his written report he could not assess the "sequelae to head injury during childhood", given the conditions of Petitioner's incarceration. Accordingly, "it would be worthwhile to conduct neuropsychological evaluation of this individual to rule out an

organic etiology."

Despite all of this information, counsel did not investigate further, ostensibly based upon a disputed conversation in which the psychologist expressed a belief that further evaluation might not be helpful. Counsel claimed that they chose to present instead a lingering doubt defense at sentencing. But the record clearly reflects that they never in fact implemented this defense. They called Petitioner to testify at sentencing but he never denied killing the victim. In closing argument both counsel conceded guilt. As a consequence, the jury sentenced Petitioner to death without any appreciation of the brain injury he had suffered as a child, which would have offered an explanation, although not an excuse, for his criminal conduct.

Yet, the majority of the Eleventh Circuit panel found no constitutional complaint, based upon a multileveled and ever increasing presumption of reasonableness. Although counsel had every reason to believe that Petitioner may be suffering from a brain injury, the failure to investigate this injury was nevertheless determined to be reasonable despite the fact that the claimed alternative mitigation case of lingering doubt was never presented.

The facts of this case are virtually indistinguishable from

those of other post-Strickland ineffective assistance of counsel decisions of this Court, such as Wiggins v. Smith, 539 U.S. 510 (2003). In Wiggins, counsel had available a one page account of the defendant's "personal history" in a written presentence investigation report, which described the defendant's "misery as a youth" and quoting the defendant's description of his own background as "disgusting." Id., at 523. Counsel also reviewed Department of Social Services records regarding the defendant's foster care placements. Yet counsel did no further investigation of the defendant's background, such as creating a social history, which would have revealed incidents of physical and sexual abuse. They claimed that they intended to focus the mitigation case instead on "retry[ing] the factual case" by "disputing Wiggins' direct responsibility for the murder." Id., at 517. This Court found that even under the deferential standard of 28 U.S.C. §2254, a conclusion that counsel's representation in this situation was effective assistance of counsel was an "unreasonable application" of "clearly established" Supreme Court law.

In so concluding, the Court noted the duty of counsel to conduct a mitigation investigation that "should comprise efforts to discover *all reasonably available* mitigating evidence", citing to Guideline 11.4.1(C) of the ABA Guidelines for the

Appointment and Performance of Counsel in Death Penalty Cases (1989). Id., at 524. (emphasis added). As to the claim that counsel had made a reasonable strategic decision to focus on the defendant's responsibility for the murder, the Court noted that the record did not reflect that such a strategy was actually employed. Instead, "[f]ar from focusing exclusively on petitioner's direct responsibility," counsel put on a "half-hearted mitigation case", similar to the mitigation case presented here. Given this record, this Court understandably concluded that the claim of a "strategic decision" to justify the limited mitigation investigation was "more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." Id., at 526-526.

Just as Wiggins' counsel knew from the presentence report of their client's horrible childhood, Petitioner's counsel here well knew that Petitioner had been run over by a car when he was only two years old and likely had suffered brain damage. His mother told them. Petitioner told the police and the injury was still visible on Petitioner's skull. In his written report, the psychologist they retained recommended neuropsychological testing to rule in or out brain injury. But, just as the Wiggins attorneys failed to follow up on the presentence report,

Petitioner's attorneys failed to follow up on the information that they had and the written recommendation of their own psychologist. While, after trial, they claimed that they made a strategic decision to concentrate on a lingering doubt mitigation case, the record shows that this claimed alternative defense of lingering doubt was never employed, just as the claimed no direct involvement in the murder argument was never advanced at sentencing in Wiggins. Petitioner was called, but never denied his guilt. Indeed, his attorneys admitted his guilt in closing argument. This claim of a strategic choice of an alternative defense, accepted by the state courts and by the majority of the Eleventh Circuit panel, was nothing more than the same type of "*post hoc* rationalization of counsel's conduct" in order to excuse a "half hearted mitigation case", when compelling mitigation was available, advanced by the attorneys in Wiggins. Id., at 526-527.

Moreover, in Wiggins the issue was whether the lower courts' conclusions that the defendant had received effective assistance of counsel at sentencing was nevertheless a reasonable application of settled Supreme Court law, and this Court found the lower court's decisions were not. In this case, because Petitioner's petition for relief under 28 U.S.C. §2254 was filed prior to the enactment of the Antiterrorism and

Effective Death Penalty Act of 1996, there is no need even to apply the current deferential standard under 28 U.S.C. §2254. Lindh v. Murphy, 521 U.S. 1215 (1994). Therefore, it is even a more compelling case for relief than Wiggins and an even more compelling case of the failure of the lower courts to follow the binding authority of this Court.

The standard employed by the majority in the panel decision of the Eleventh Circuit is not consistent with the holdings of this Court in Strickland; Wiggins; Williams v. Taylor, 529 U.S. 362 (2000); Rompilla v. Beard, 545 U.S. 374 (2005) and Porter v. McCullom, 130 S.Ct. 447 (2009). The Eleventh Circuit has now adopted a super-presumption of reasonableness standard never envisioned by the decisions of this Court. Accordingly, this Court should exercise its discretion under Supreme Court Rule 10(c) to grant a writ of certiorari in this case in order to correct the misapplication of binding Supreme Court authority in an important area of ineffective assistance of counsel law.

[signatures on next page]

This 23rd day of February, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served Ms. Beth Burton, Assistant Attorney General, 40 Capitol Square, S.W., Atlanta, GA 30334-1300 with a copy of the within and foregoing **Reply Brief to Brief in Opposition on Behalf of Respondent** by depositing in the U.S. Mail in a properly addressed envelope with sufficient postage affixed thereon to assure delivery.

This 23rd day of February, 2010.

John R. Martin

PER CURIAM

SUPREME COURT OF THE UNITED STATES

LAWRENCE JOSEPH JEFFERSON *v.* STEPHEN UPTON, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09–8852. Decided May 24, 2010

PER CURIAM.

Petitioner Lawrence Jefferson, who has been sentenced to death, claimed in both state and federal courts that his lawyers were constitutionally inadequate because they failed to investigate a traumatic head injury that he suffered as a child. The state court rejected that claim after making a finding that the attorneys were advised by an expert that such investigation was unnecessary. Under the governing federal statute, that factual finding is presumed correct unless any one of eight exceptions applies. See 28 U. S. C. §§2254(d)(1)–(8) (1994 ed.). But the Court of Appeals considered only one of those exceptions (specifically §2254(d)(8)). And on that basis, it considered itself "duty-bound" to accept the state court's finding, and rejected Jefferson's claim. Because the Court of Appeals did not fully consider several remaining potentially applicable exceptions, we vacate its judgment and remand.

I

When Jefferson was a child, he "suffered a serious injury to his head." *Jefferson* v. *Terry*, 490 F. Supp. 2d 1261, 1326 (ND Ga. 2007); see *id.*, at 1320 (quoting Jefferson's mother's testimony that "a car ran over the top of his head" when he was two years old). The accident left his skull swollen and misshapen and his forehead visibly scarred. *Jefferson* v. *Hall*, 570 F. 3d 1283, 1311, 1315, n. 4 (CA11 2009) (Carnes, J., dissenting). During the District Court proceedings below, uncontroverted experts testified

that, as a result of his head injury, Jefferson has "permanent brain damage" that "causes abnormal behavior" over which he "has no or substantially limited control." 490 F. Supp. 2d, at 1321–1322. According to these experts, Jefferson's condition causes "'emotional dullness,'" "'restless or aggressive characteristics,'" "'impulsiveness,'" "'temper outbursts,'" "'markedly diminished impulse control,'" "'impaired social judgment,'" and "'transient outbursts of rage which are totally inconsistent with his normal behavioral pattern.'" *Id.*, at 1322, 1327.

The experts further testified that Jefferson's "'severe cognitive disabilities'" "'profoundly alter'" his "'ability to plan and coordinate his actions, to be aware of the consequences of his behavior, and to engage in premeditated or intentional acts.'" *Id.*, at 1327. But they testified he is neither psychotic nor retarded. *Id.*, at 1319. Thus, they said, to a lay observer or even to a professional psychologist, Jefferson does not outwardly appear mentally impaired. Indeed, according to the experts, "'the behavior that may result from'" his condition "'could, without the administration of proper testing, be mistaken for volitional.'" *Id.*, at 1322.

Jefferson faced a death sentence for killing his coworker while the two men were fishing. *Id.*, at 1271–1272. Prior to trial, he was examined by a psychologist named Dr. Gary Dudley, who prepared a formal report in which he concluded that Jefferson's mental deficiencies do not impair "'his judgment or decision-making capacity.'" 570 F. 3d, at 1294 (quoting report). But Dr. Dudley's report included a caveat: "'One possibility that could not be explored because of [Jefferson's] incarceration has to do with the sequelae,'" *i.e.*, pathologies, related to a "'head injury experienced during childhood.'" *Ibid.* "'In my opinion,'" he wrote, "'it would be worthwhile to conduct neuropsychological evaluation of this individual to rule out an organic etiology,'" *i.e.*, to rule out brain damage. *Ibid.*

Although "it is undisputed that the testing" Dr. Dudley recommended "could have easily been performed," 490 F. Supp. 2d, at 1322, and that Jefferson's attorneys possessed police reports and hospital records recounting his head injury, *id.*, at 1323, the attorneys did not have Jefferson tested. At sentencing, they presented only testimony from two prison guards, who stated that Jefferson was an unproblematic inmate, and from three members of Jefferson's family, who testified that he is a "responsible, generous, gentle, and kind" person and "a good father." 570 F. 3d, at 1290–1291. And while Jefferson's mother briefly mentioned the car accident, "she was not questioned and did not offer any testimony regarding the impact, if any, that the accident had on him." *Id.*, at 1291. Thus, "[a]s far as the jury knew, Jefferson did not suffer from brain damage or neurological impairment; he had no organic disorders"; and "his emotional stability, impulse control, and judgment were perfectly normal." *Id.*, at 1311 (Carnes, J., dissenting).

Jefferson sought habeas relief in state court, arguing that his two trial attorneys unreasonably failed to pursue brain-damage testing. In response, the trial attorneys testified that they did not pursue such testing because, after delivering his formal written report, Dr. Dudley later told them that further investigation "'may be a waste of time because the rest of [his] report'" had "'said that [Jefferson] was non psychotic.'" 570 F. 3d, at 1295 (quoting testimony). Dr. Dudley did not testify in person at the hearing, but he submitted a sworn affidavit denying that he had ever made such statements. He said "it had always been his expert opinion 'that neuropsychological testing was necessary'" and that when he wrote as much in his formal report "he 'meant it.'" *Id.*, at 1312 (Carnes, J., dissenting) (quoting affidavit). He added, "'I never, before or after that report, suggested to [Jefferson's attorneys] that such an evaluation was not necessary or that it

would not be worthwhile.'" *Ibid.*; cf. Pet. for Cert. 17, n. 12.

Jefferson contends, and the State has not disputed, that after the hearing concluded the state-court judge contacted the attorneys for the State *ex parte*. And in a private conversation that included neither Jefferson nor his attorneys, the judge asked the State's attorneys to draft the opinion of the court. See *id.*, at 3, 12. According to Jefferson, no such request was made of him, nor was he informed of the request made to opposing counsel. *Id.*, at 12, n. 8, 13; see also *Jefferson* v. *Zant*, 263 Ga. 316, 431 S. E. 2d 110, 111 (1993) ("Jefferson contends [the order] amounts to no more and no less than a reply brief to which [he] has not had a chance to respond").

The attorneys for the State prepared an opinion finding that "Dr. Dudley led [Jefferson's trial attorneys] to believe that further investigation would simply be a waste of time because Petitioner [i]s not psychotic." *Jefferson* v. *Zant*, Civ. Action No. 87–V–1241 (Super. Ct. Butts Cty., Ga., Oct. 7, 1992), p. 16, App. 4 to Pet. for Cert. 16 (hereinafter State Order); see also *id.*, at 37. The opinion "specifically credits the testimony of [the trial attorneys] with regard to their efforts to investigate Petitioner's mental condition." *Id.*, at 18; see also *id.*, at 36. And relying on these findings, it concludes that Jefferson's attorneys "made a reasonable investigation into [his] mental health" and were thus not ineffective. *Id.*, at 37.

Notably, as the Georgia Supreme Court acknowledged, the State's opinion discusses statements purportedly made on Jefferson's behalf by a witness "who did not testify" or participate in the proceedings. 263 Ga., at 318, 431 S. E. 2d, at 112; see State Order 24–25. Nonetheless, the opinion "was adopted verbatim by the [state] court." 263 Ga., at 316, 431 S. E. 2d, at 111. And while the State Supreme Court recognized that we have "'criticized'" such a practice, it affirmed the judgment. *Id.*, at 317, 320, 431 S. E.

2d, at 112, 114 (quoting *Anderson* v. *Bessemer City*, 470 U. S. 564, 572 (1985)).

II

Jefferson next sought federal habeas relief in the District Court. In his opening brief, he argued that "there is no reason under principles of comity or otherwise to give any deference to the findings of the State Habeas Corpus Court." Brief for Petitioner in No. 1:96–CV–989–CC (ND Ga.), Doc. 105, p. 4, and n. 1 (hereinafter District Court Brief). In support of that argument, he claimed that the state court "merely signed an order drafted by the State without revision of a single word," even though the order "described witnesses who never testified." *Ibid.* And he said that such a process "rais[es] serious doubts as to whether [the judge] even read, much less carefully considered, the proposed order submitted by the State." *Ibid.*

The District Court ruled in Jefferson's favor. It noted that under the relevant statute "factual findings of state courts are presumed to be correct unless one of . . . eight enumerated exceptions . . . applies." 490 F. Supp. 2d, at 1280; see also *id.*, at 1280, n. 5 (listing the exceptions). And it acknowledged "the state habeas corpus court's failure to explain the basis" for its credibility findings. *Id.*, at 1324, n. 17. But it accepted Jefferson's claim of ineffective assistance of counsel without disturbing the state court's factual findings because it believed he should prevail even accepting those findings as true. *Id.*, at 1324–1325.

On appeal, Jefferson defended the District Court's judgment primarily on its own terms. But he also argued that the state court's factfinding was "dubious at best" in light of the process that court employed, and that the Court of Appeals therefore "should harbor serious doubts about the findings of fact and credibility determinations in the state court record." Brief for Petitioner/Appellee in No. 07–

12502 (CA11), pp. 31–32, n. 10 (hereinafter Appeals Brief).

A divided Court of Appeals panel reversed, and Jefferson filed this petition for certiorari asking us to review his claim of ineffective assistance of counsel. And, in so doing, he challenges—as he did in the State Supreme Court, the District Court, and the Court of Appeals—"the fact findings of the state court," given what he describes as the deficient procedure employed by that court while reviewing his claim. Pet. for Cert. 11–13, 17, n. 12, 18, n. 13 (recounting "'reason[s] to doubt'" the state court's findings). Cf. *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 379 (1995) (stating standard for preserving an issue for review in this Court).

III

This habeas application was filed prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 and is therefore governed by federal habeas law as it existed prior to that point. *Lindh* v. *Murphy*, 521 U. S. 320, 326–336 (1997). In 1963, we set forth the "appropriate standard" to be applied by a "federal court in habeas corpus" when "the facts" pertinent to a habeas application "are in dispute." *Townsend* v. *Sain*, 372 U. S. 293, 312. We held that when "the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings" the district court "ordinarily should . . . accept the facts as found" by the state-court judge. *Id.*, at 318. However, "if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding," we held that the federal court "must hold an evidentiary hearing" to resolve any facts that "are in dispute." *Id.*, at 312. We further "explain[ed] the controlling criteria" by enumerating six circumstances in which such an evidentiary hearing would be required:

"(1) the merits of the factual dispute were not resolved

in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) *the fact-finding procedure* employed by the state court *was not adequate to afford a full and fair hearing*; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) *for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.*" *Id.*, at 313 (emphasis added).

Three years later, in 1966, Congress enacted an amendment to the federal habeas statute that "was an almost verbatim codification of the standards delineated in *Townsend* v. *Sain*." *Miller* v. *Fenton*, 474 U. S. 104, 111 (1985). That codification read in relevant part as follows:

> "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination . . . of a factual issue, made by a State court of competent jurisdiction . . . , shall be presumed to be correct, *unless* the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> "(1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> "(2) *that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;*
>
> "(3) that the material facts were not adequately developed at the State court hearing;
>
> "(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> "(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right,

failed to appoint counsel to represent him in the State court proceeding;

"(6) *that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or*

"(7) *that the applicant was otherwise denied due process of law in the State court proceeding;*

"(8) or unless . . . the Federal court on a consideration of [the relevant] part of the record as a whole concludes that such factual determination *is not fairly supported by the record.*" §2254(d) (emphasis added).

As is clear from the statutory text quoted above, and as the District Court correctly stated, if any "one of the eight enumerated exceptions . . . applies" then "the state court's factfinding is not presumed correct." 490 F. Supp. 2d, at 1280; accord, *Miller, supra,* at 105 ("Under 28 U. S. C. §2254(d), state-court findings of fact 'shall be presumed to be correct' in a federal habeas corpus proceeding unless one of eight enumerated exceptions applies"); see also 1 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure §20.2*c*, pp. 915–918 (5th ed. 2005).

Jefferson has consistently argued that the federal courts "should harbor serious doubts about" and should not "give any deference to" the "findings of fact and credibility determinations" made by the state habeas court because those findings were drafted exclusively by the attorneys for the State pursuant to an *ex parte* request from the state-court judge, who made no such request of Jefferson, failed to notify Jefferson of the request made to opposing counsel, and adopted the State's proposed opinion verbatim even though it recounted evidence from a nonexistent witness. See, *e.g.,* Appeals Brief 32, n. 10; District Court Brief 4, n. 1; Pet. for Cert. 12. These are arguments that the state court's *process* was deficient. In other words, they are arguments that Jefferson "did not receive a full and fair evidentiary hearing in . . . state court." *Town-*

send, supra, at 312. Or, to use the statutory language, they are arguments that the state court's "factfinding procedure," "hearing," and "proceeding" were not "full, fair, and adequate." §§2254(d)(2), (6), (7).

But the Court of Appeals did not consider the state court's process when it applied the statutory presumption of correctness. Instead, it invoked Circuit precedent that applied only paragraph (8) of §2254(d), which, codifying the second *Townsend* exception, 372 U. S., at 315, lifts the presumption of correctness for findings that are "not fairly supported by the record." See 570 F. 3d, at 1300 (quoting *Jackson* v. *Herring*, 42 F. 3d 1350, 1366 (CA11 1995), in turn quoting 28 U. S. C. §2254(d)(8)). And even though the Court of Appeals "recognize[d]" that Jefferson had argued that the state court's *process* had produced factual findings that were "'dubious at best,'" and that federal courts should therefore "'harbor serious doubts about'" the state court's "'findings of fact and credibility,'" the Court of Appeals nonetheless held that the state court's findings are "'entitled to a presumption of correctness'" that it was "duty-bound" to apply. 570 F. 3d, at 1304, n. 8 (quoting Appeals Brief 32, n. 10). The Court of Appeals explicitly stated that it considered itself "duty-bound" to defer to the state court's findings because "Jefferson has not argued that any of the state courts' factual findings were '*not fairly supported by the record*,'" a direct reference to §2254(d)(8) and to the second *Townsend* exception. 570 F. 3d, at 1304, n. 8 (emphasis added). And it then concluded: "Based on these factual findings of the state habeas courts—all of which are *fairly supported by the record*—we believe that Jefferson's counsel were reasonable in deciding not to pursue neuropsychological testing." *Id.*, at 1304 (emphasis added).

In our view, the Court of Appeals did not properly consider the legal status of the state court's factual findings. Under *Townsend*, as codified by the governing statute, a

federal court is not "duty-bound" to accept any and all state-court findings that are "fairly supported by the record." Those words come from §2254(d)(8), which is only one of eight enumerated exceptions to the presumption of correctness. But there are seven others, see §§2254(d)(1)–(7), none of which the Court of Appeals considered when addressing Jefferson's claim. To be sure, we have previously stated in cases *applying* §2254(d)(8) that "a federal court" may not overturn a state court's factual conclusion "unless the conclusion is not 'fairly supported by the record.'" *Parker* v. *Dugger*, 498 U. S. 308, 320 (1991) (granting federal habeas relief after rejecting state court's finding under §2254(d)(8)); see also *Demosthenes* v. *Baal*, 495 U. S. 731 (1990) *(per curiam)* (applying §2254(d)(8)); cf. *post*, at 10 (SCALIA, J., dissenting). But in those cases there was no suggestion that any *other* provisions enumerated in §2254(d) were at issue. That is not the case here. In treating §2254(d)(8) as the *exclusive* statutory exception, and by failing to address Jefferson's argument that the state court's *procedures* deprived its findings of deference, the Court of Appeals applied the statute and our precedents incorrectly.

Although we have stated that a court's "verbatim adoption of findings of fact prepared by prevailing parties" should be treated as findings of the court, we have also criticized that practice. *Anderson*, 470 U. S., at 572. And we have not considered the lawfulness of, nor the application of the habeas statute to, the use of such a practice where (1) a judge solicits the proposed findings *ex parte*, (2) does not provide the opposing party an opportunity to criticize the findings or to submit his own, or (3) adopts findings that contain internal evidence suggesting that the judge may not have read them. Cf. *id.*, at 568; Ga. Code of Judicial Conduct, Canon 3(A)(4) (1993) (prohibiting *ex parte* judicial communications).

We decline to determine in the first instance whether

any of the exceptions enumerated in §§2254(d)(1)–(8) apply in this case, see, *e.g.*, *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005), especially given that the facts surrounding the state habeas court's process are undeveloped. Respondent has conceded that it drafted the state court's final order at that court's request and that the order was adopted verbatim, 263 Ga., at 317, 431 S. E. 2d, at 111, and has not disputed in this Court that the state court solicited the order "*ex parte* and without prior notice" and "did not seek a proposed order from Petitioner," Pet. for Cert. 12, and n. 8. But the precise nature of what transpired during the state-court proceedings is not fully known. See 263 Ga. at 316–317, 431 S. E. 2d, at 111 (noting dispute as to whether Jefferson "had a chance to respond" to the final order); see also Pet. for Cert. 13.

Accordingly, we believe it necessary for the lower courts to determine on remand whether the state court's factual findings warrant a presumption of correctness, and to conduct any further proceedings as may be appropriate in light of their resolution of that issue. See *Townsend*, *supra*, at 313–319; *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1 (1992). In so holding, we express no opinion as to whether Jefferson's Sixth Amendment rights were violated assuming the state court's factual findings to be true.

* * *

The petition for a writ of certiorari and motion to proceed *in forma pauperis* are granted. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

LAWRENCE JOSEPH JEFFERSON *v.* STEPHEN UPTON, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09–8852. Decided May 24, 2010

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The question presented by Jefferson's petition for writ of certiorari is whether his trial attorneys rendered ineffective assistance of counsel when they declined to pursue further investigation of Jefferson's childhood head injury. In my view the Court should either answer that question or (as I would prefer) deny the petition. Instead, it summarily vacates the judgment of the Court of Appeals on an altogether different ground that was neither raised nor passed upon below and that is not fairly included within the sole question presented. To make matters worse, the Court conjures up an "error" with respect to that ground by misquoting and mischaracterizing the Court of Appeals' opinion, *ante*, at 9–10, and by overlooking relevant authority from this Court. I respectfully dissent.

I

A

The prior version of 28 U. S. C. §2254(d) (1994 ed.) applicable in this case provided that in federal habeas proceedings the factual determinations of a state court "shall be presumed to be correct," unless the applicant proves, the respondent admits, or a federal court determines that one of eight exceptions set forth in §2254(d)(1)–(8) applies. The Court concludes that the Eleventh Circuit

misapplied that provision and our precedents by treating one of those exceptions, §2254(d)(8), "as the *exclusive* statutory exception" to the presumption of correctness, and by failing to address whether §2254(d)(2), (6), or (7) might also bar application of that presumption.[1] *Ante*, at 10.

The Court's opinion, however, is the first anyone (including Jefferson) has heard of this argument. Jefferson's briefs below contain no discussion or even citation of subsection (d)—let alone of paragraphs (2), (6), or (7)—and the courts below understandably never passed upon the application of those provisions. Under our longstanding practice, that should be the end of the matter. See, *e.g.*, *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212–213 (1998).

But the Court insists, *ante*, at 5–6, 8–9, that if we squint at them long enough we can see in Jefferson's briefs below a challenge to the state court's fact-finding process cognizable under §2254(d)(2), (6), and (7). But the handful of isolated, vague statements it musters (buried in hundreds of pages of briefs) show no such thing. The Court's only evidence that Jefferson presented the point to the District Court, *ante*, at 5, 8, consists of a single sentence of text (and an accompanying two-sentence footnote) in the "Prior Proceedings" section of his 180-page brief. Final Evidentiary Brief and Proposed Findings of Fact and Conclusions

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[1] These four exceptions in 28 U. S. C. §2254(d) (1994 ed.) were:

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

. . . . . .

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless . . . the Federal court on a consideration of [the relevant] part of the record as a whole concludes that such factual determination is not fairly supported by the record . . . ."

of Law, Record in No. 1:96–CV–989–CC (ND Ga.), Doc. 105 (hereinafter District Court Brief). The sentence is: "In entering the State Habeas Corpus Order Judge Newton merely signed an order drafted by the State without revision of a single word." *Id.*, at 4. The footnote adds:

> "[T]he order signed by Judge Newton described witnesses who never testified, raising serious doubt as to whether he even read, much less carefully considered, the proposed order submitted by the State. In this circumstance, there is no reason under principles of comity or otherwise to give any deference to the findings of the State Habeas Court, because there was apparently no serious consideration or deliberation of the factual and legal issues raised." *Ibid.*, n. 1.

This passing suggestion that deference would be unwarranted is, to put it mildly, an elliptical way to argue that the state fact-finding procedure was inadequate, §2254(d)(2), that Jefferson was denied a full, fair, and adequate hearing, §2254(d)(6), or that Jefferson was denied due process of law, §2254(d)(7). And it only appeared, I emphasize again, in the "Prior Proceedings" section of the brief. The *argument* section of Jefferson's District Court Brief, consisting of 164 pages and containing separate assignments of error from III to XLIV (44), makes no mention of the ground upon which the Court today relies. And the assignment of error that is the basis for the question presented in Jefferson's petition, VI, *id.*, at 47–80, did not dispute the state courts' factual findings under §2254(d), but only challenged the state courts' legal conclusion that his attorneys' failure to conduct a fuller investigation into the head injury he suffered as a child was not deficient performance under *Strickland* v. *Washington*, 466 U. S. 668 (1984).

Jefferson also did not raise the point in the Eleventh Circuit. His brief to that court acknowledged that the

state courts' "[f]indings of fact and credibility determinations are reviewed for clear error." Brief for Petitioner/Appellee, No. 07–12502, pp. 16–17 (hereinafter Appeals Brief). It declared that "The District Court Correctly Deferred to the Fact Findings of the State Court" in adjudicating his ineffective-assistance-of-counsel claim. *Id.*, at 21 (capitalization and boldface type deleted); see also *id.*, at 29, and n. 7, 31. And it conceded that with respect to the ineffective-assistance claim, "[t]he relevant facts are not in dispute." *Id.*, at 24. Jefferson did characterize the state habeas court's factual findings as generally "dubious" and suggested there were "serious doubts" about them, *id.*, at 32, n. 10. But not once did he argue that the dubiousness of the findings was the consequence of a failure to meet the requirements of §2254(d)(2), (6), or (7)—or even more generally that the findings should not be presumed correct under §2254(d). Instead, he pressed the same argument he made in the District Court: Even if the state courts' factual findings were correct, his trial attorneys rendered ineffective assistance in deciding to forgo further investigation of his childhood head injury. *Id.*, at 31–33, 50–51.

Nor did the courts below pass upon the argument the Court now addresses. The District Court did not dispute the state courts' factual findings. *Jefferson* v. *Terry*, 490 F. Supp. 2d 1261, 1319–1320 (ND Ga. 2007). It accepted those findings as true, including the state habeas court's credibility findings, *id.*, at 1323–1324, and n. 17, but held "as a matter of law" that it was objectively unreasonable for Jefferson's attorneys "not to investigate" further into the effect, if any, of the accident on Jefferson's mental capacity and health, *id.*, at 1324. Concluding that Jefferson was thereby prejudiced, the court ordered a new sentencing hearing. *Id.*, at 1328.

The Court of Appeals disagreed with that determination and reversed, holding that his trial attorneys' performance

was not objectively unreasonable under *Strickland*. *Jefferson* v. *Hall*, 570 F. 3d 1283, 1301–1309 (CA11 2009). That court correctly stated the applicable framework under §2254(d):

> "Pre-AEDPA, questions of law and mixed questions of law and fact resolved by state habeas courts are reviewed *de novo*, while the state courts' factual findings are 'subject to the presumption of correctness.' *Freund v. Butterworth*, 165 F. 3d 839, 861 (11th Cir. 1999). Although these findings may be disregarded *if, for example,* they are not 'fairly supported by the record,' *Jackson v. Herring*, 42 F. 3d 1350, 1366 (11th Cir. 1995) (quoting 28 U. S. C. §2254(d)(8)), this Court has construed the 'presumption of correctness' standard to be the same as the 'clear error' standard of review." *Id.*, at 1300 (emphasis added; footnote omitted).

Confronted with no argument that §2254(d)(1)–(7) applied or that it must disregard the state courts' factual findings, the Court of Appeals understandably did not pass upon those questions.

The Court of Appeals did consider the record on its own, as required by §2254(d)(8), to determine whether the state courts' factual determinations were fairly supported by the record. *Id.*, at 1303–1304, and n. 8. In doing so, the court "specifically note[d] that neither Jefferson nor the district court questioned the state court's factual finding that [the defense's psychiatric expert] led [one of Jefferson's attorney's] to believe that further investigation *would* simply be a waste of time, . . . despite [his attorney's] testimony that [the expert] told him it 'may' be a waste of time." *Id.*, at 1303, n. 8. It added that Jefferson did not "point to any particular finding that was clearly erroneous," *id.*, at 1304, n. 8—applying the same standard Jefferson had proposed in his brief, see *supra*, at 3. Even the dissent agreed that

the court was "obliged to accept" the state courts' credibility determination, despite the "reasons to doubt it." 570 F. 3d, at 1312 (opinion of Carnes, J.). The dissent did not cite §2254(d)(2), (6), or (7), but instead focused on the same question of constitutional law that occupied Jefferson's briefs, the District Court's opinion, and the majority's opinion: whether, accepting the factual findings and credibility determination of the state courts as true, Jefferson's attorneys rendered ineffective assistance of counsel. *That* is only the question that occupied the courts and the parties below.

B

It is bad enough that the Court decides an issue not raised or resolved in the lower courts. It is much worse that it decides an issue Jefferson has not even asked *us* to address. Under this Court's Rule 14.1(a), "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." We apply that rule in all but "the most exceptional cases, where reasons of urgency or of economy suggest the need to address the unpresented question under consideration." *Yee* v. *Escondido*, 503 U. S. 519, 535 (1992) (citation and internal quotation marks omitted).

Jefferson's petition for writ of certiorari presents a single question:

> "[W]hether the majority opinion, in affording trial counsel's decision to limit the scope of investigation in a death penalty case 'higher-than-strong presumption of reasonableness' *[sic]* conflicts with this Court's precedent as announced in *Williams v. Taylor*, 529 U. S. 362 (2000), *Wiggins v. Smith*, 539 U. S. 510 (2003), *Rompilla v. Beard*, 545 U. S. 374 (2005), and *Porter v. McCollum*, 130 S. Ct. 447 (2009)." Pet. for Cert. i.

This is a straightforward request for error correction on a constitutional claim in light of those four decisions, and neither the request nor those cases have anything to do with the pre-AEDPA version of §2254(d). Nor does that question necessarily encompass whether the Court of Appeals misapplied that version of §2254(d) in determining the deference due to the state courts' factual findings. The statutory question may be "*related* to," and "perhaps *complementary* to the one petitioner presented," but it is not "fairly included therein." *Yee*, *supra*, at 537 (internal quotation marks omitted).

As for the body of Jefferson's petition: Far from invoking §2254(d)'s exceptions to the presumption of correctness to support the Sixth Amendment claim, the petition does not even mention subsection (d), let alone paragraphs (2), (6), or (7). There is *no* argument, *anywhere* in the section entitled "Reasons for Granting the Writ," that the state courts' factual findings are not entitled to a presumption of correctness.

The Court claims, *ante*, at 6, that Jefferson sufficiently presented the statutory issue by his characterizations of the state courts' factual findings in the "Statement of the Case" section of his petition, see Pet. for Cert. 11–13, 17, n. 12, 18, n. 13. Even if that were so, "'the fact that [petitioner] discussed this issue in the text of [his] petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review.'" *Wood* v. *Allen*, 558 U. S. ___, ___ (2010) (slip op., at 13) (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U. S. Philips Corp.*, 510 U. S. 27, 31, n. 5 (1993) *(per curiam)*). But in any event, the cited passages do not remotely present the statutory issue. They contain no argument that §2254(d)'s presumption is inapplicable because of §2254(d)(2), (6), or (7), but merely describe the proceedings below, see Pet. for Cert. 11–13, and assert that there might be reasons to doubt the state-

court findings (but for the §2254(d) presumption), see *id.*, at 17, n. 12, 18, n. 13.

"The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci* v. *Regan*, 714 F. 2d 171, 177 (CADC 1983) (opinion of Scalia, J.). Our refusal to abide by standard rules of appellate practice is unfair to the Eleventh Circuit, whose judgment the Court vacates, and especially to the respondent here, who suffers a loss in this Court without *ever* having an opportunity to address the merits of the statutory question the Court decides.

II

The Court's approach would be objectionable even if it were correct that the Court of Appeals went astray. But it is not. The Court of Appeals did *not* treat §2254(d)(8) as "the *exclusive* statutory exception" to the presumption of correctness. *Ante*, at 10. It is true that the majority's opinion—as well as the dissent's—discussed only §2254(d)(8). But that is because only §2254(d)(8), and not §2254(d)(2), (6), or (7), was ever brought to the court's attention. On the fair reading we owe the Eleventh Circuit's opinion, there simply was no error in its application of §2254(d).

The Court asserts, however, that the Eleventh Circuit ignored the other seven paragraphs in §2254(d) when it "invoked Circuit precedent that applied only paragraph (8) of §2254(d)." *Ante*, at 9. It did nothing of the sort. The Court of Appeals said that a state court's factual findings "may be disregarded *if, for example,* they are not 'fairly supported by the record,' *Jackson v. Herring*, 42 F. 3d 1350, 1366 (11th Cir. 1995) (quoting 28 U. S. C. §2254(d)(8))." 570 F. 3d, at 1300 (emphasis added). The Court of Appeals thus expressly acknowledged that

§2254(d)(8) was *but one example* of the grounds for disregarding a state court's factual findings. And the Circuit precedent it cited, *Jackson* v. *Herring*, similarly did not imply, much less hold, that §2254(d)(8) provided the only grounds for setting aside a state court's factual findings under §2254(d). See 42 F. 3d, at 1366.

Next, the Court states:

> "And even though the Court of Appeals 'recognize[d]' that Jefferson had argued that the state court's *process* had produced factual findings that were '"dubious at best,"' and that federal courts should therefore '"harbor serious doubts about"' the state court's '"findings of fact and credibility,"' the Court of Appeals nonetheless held that the state court's findings are '"entitled to a presumption of correctness"' that it was '"duty-bound"' to apply. 570 F. 3d, at 1304, n. 8 (quoting Appeals Brief 32, n. 10)." *Ante*, at 9.

Again, the Court has plucked isolated language from here and there in the Court of Appeals' opinion, to produce a reading which suggests that the Court of Appeals agreed with, or at least did not contest, Jefferson's claim of "serious doubts." That is not so. In the *first* paragraph of footnote eight of its opinion, the panel reasoned that it was "duty-bound to accept" the state courts' factual findings because it concluded they "are clear, unambiguous, and fairly supported by the record." 570 F. 3d, at 1303–1304, n. 8. That language precedes the panel's analysis—in the *second* paragraph of footnote eight—regarding Jefferson's statements that the findings were "dubious" and raised "serious doubts." The Court omits the panel's *actual* explanation for declining to credit Jefferson's general characterization of the quality of the record, which is: "Jefferson does not point to any particular factual finding that was clearly erroneous, and Jefferson even says in the argument section of his brief that, '[t]he relevant facts are

not in dispute.'" *Id.*, at 1304, n. 8.

By the way, even if the Court of Appeals had carelessly described application of the pre-AEDPA version of §2254(d) in the manner which the Court suggests, that would have been no worse than what we have done. For example, in *Demosthenes* v. *Baal*, 495 U. S. 731, 735 (1990) *(per curiam)*, we stated that a federal court may not overturn a state habeas court's factual determinations "unless it concludes that they are not 'fairly supported by the record.' See 28 U. S. C. §2254(d)(8)." And in *Parker* v. *Dugger*, 498 U. S. 308, 320 (1991), we explained that a federal habeas court "is not to overturn a factual conclusion of a state court, including a state appellate court, unless the conclusion is not 'fairly supported by the record.'"[2]

* * *

Generally speaking, we have no power to set aside the duly entered judgment of a lower federal court unless we find it to have been in error. More specifically, except where there has been an intervening legal development (such as a subsequently announced opinion of ours) that

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[2]The Court attempts to distinguish these two cases on the ground that they contained "no suggestion that any *other* provisions enumerated in §2254(d) were at issue," whereas "[t]hat is not the case here." *Ante*, at 10. That is simply not so. As already noted, there was *no* "suggestion" here (let alone an actual *argument*) that paragraphs (2), (6), or (7) were in issue. And if the Court means no more than that petitioner here made some process-type noises, the same was true—and indeed more true—of *Parker* and *Demosthenes*. In *Parker*, we stated the "crux of [petitioner's] contentions" was that the state courts "fail[ed] to treat adequately" the evidence he presented. 498 U. S., at 313. In *Demosthenes*, the Ninth Circuit had said that the state court's process for determining whether the capital inmate was competent was deficient because "'a full evidentiary hearing on competence should have been held.'" 495 U. S., at 736 (quoting Order in *Baal* v. *Godinez*, No. 90–15716 (CA9, June 2, 1990), p. 5).

might alter the judgment below, we cannot *grant* a petition for certiorari, *vacate* the judgment below, and *remand* the case (GVR) simply to obtain a re-do. *Webster* v. *Cooper*, 558 U. S. ___, ___ (2009) (SCALIA, J., dissenting) (slip op., at 3). Yet today the Court vacates the judgment of the Eleventh Circuit on the basis of an error that court did not commit, with respect to a statutory issue that had never previously been raised, and remands for more extensive consideration of a new argument that *might* affect the judgment. Under the taxonomy of our increasingly unprincipled GVR practice, this creature is of the same genus as the "Summary Remand for a More Extensive Opinion than Petitioner Requested" (SRMEOPR). *Id.*, at ___ (slip op., at 4). But it is a distinctly odious species, deserving of its own name: Summary Remand to Ponder a Point Raised Neither Here nor Below (SRPPRNHB).